No. _____

In The
Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

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

---

Application to Stay Proceedings Pending Disposition of a Petition for a Writ of Certiorari

---

Jonathan M. Freiman
Counsel of Record
Tahlia Townsend
Benjamin M. Daniels
David R. Roth
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

David L. Hall
Wiggin and Dana LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

No. _____

In The
Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

Application to Stay Proceedings Pending Disposition of a Petition for a Writ of Certiorari

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Pursuant to Supreme Court Rules 22 and 23, as well as 28 U.S.C. §§ 2101(f) & 1651(a), Petitioners Federal Republic of Germany ("Germany") and the Stiftung Preussischer Kulturbesitz ("SPK") respectfully request a stay of proceedings following the judgment of the Court of Appeals for the District of Columbia Circuit dated July 10, 2018, pending the disposition of a timely petition for certiorari.

The D.C. Circuit's decision held that Germany and its sovereign instrumentality SPK[1] are not immune from a suit in U.S. court alleging

[1] SPK is a Smithsonian-like governmental consortium of museums, archives, and research institutions in Berlin.

a forced sale of medieval reliquaries from German nationals to a German state over eighty years ago, and seeking either the return of those historical artifacts or hundreds of millions of dollars in damages. The panel concluded that the Foreign Sovereign Immunities Act ("FSIA") expropriation exception applies, and the panel refused to consider defenses based in international comity even though the plaintiffs have made no attempt to pursue judicial remedies in Germany. *See Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) (attached as Appendix A).

In doing so, the D.C. Circuit rejected the "consensus view" of the federal courts that the FSIA's so-called expropriation exception "does not cover expropriations of property belonging to a country's own nationals." *See Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring). Instead, the D.C. Circuit held that foreign sovereigns can be sued in U.S. court whenever a plaintiff alleges that the sovereign took property—even from its own national—in a manner that violates an international human rights legal norm. What's more, the D.C. Circuit held that federal courts can *never* dismiss a claim against a foreign sovereign based on international comity, no matter the

likely impact on U.S. foreign relations, and no matter whether the plaintiff has pursued available relief in the foreign sovereign's own courts.

As Judge Katsas noted in his dissent from the D.C. Circuit's denial of the petition for hearing en banc, the panel decision "clears the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories," and paradoxically makes it easier to sue foreign *states* for alleged human-rights abuses than it is to sue domestic or foreign *corporations* for aiding or abetting those alleged abuses. *See Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1350 (D.C. Cir. 2019) (Katsas, J., dissenting) (attached as Appendix B). The court's decision also created clear circuit splits. *See id.* (noting that decision "create[s] a clear split with the Seventh Circuit," and is "in tension with decisions from the Ninth and Eleventh Circuits"). And it disregarded the clearly expressed views of the Executive Branch, which has urged courts *not* to interpret the FSIA expropriation exception as the D.C. Circuit did below,[2] and which has

[2] Brief of United States as Amicus Curiae at 4–6, *Garb v. Republic of Pol.*, 440 F.3d 579 (2d Cir. 2006) (No. 02-7844) ("*Garb* Amicus") (attached as Appendix D).

repeatedly argued that courts may dismiss suits brought against foreign states or their instrumentalities when justified by the concerns of international comity.[3]

These issues will be the grounds for Germany and SPK's forthcoming petition for certiorari. But in the meantime, the D.C. Circuit's decision permits litigation on the merits to proceed. Protecting foreign sovereigns from the burdens of litigation in U.S. court is precisely why sovereign immunity exists in the first place. *See, e.g.*, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (noting that sovereign immunity is not just a defense to liability but a protection from the burdens of suit, which is lost if a case is "erroneously permitted to go to trial") (internal quotation marks omitted); *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017) (describing "sovereign immunity's basic objective" as "to free a sovereign from suit"). The same is true as to international comity: Requiring a German state museum to

[3] Brief of United States as Amicus Curiae, *Simon v. Republic of Hungary*, 2018 WL 2461996, at *11 (D.C. Cir. June 1, 2018) ("*Simon* Amicus"); Brief of United States as Amicus Curiae, *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) ("*Philipp* Amicus") (attached as Appendix C).

defend itself in the United States against a lawsuit that does not belong in U.S. court at all is an injury that cannot be remedied by a later decision from this Court reversing the D.C. Circuit's flawed decision. Respondents, by contrast, will suffer no harm from a temporary pause in this case while this Court considers Germany and SPK's forthcoming petition for certiorari.

Because there is a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse, and because further litigation while this Court considers Germany and SPK's petition causes irreparable harm to a foreign state and undermines the public interest, Petitioners ask this Court to stay proceedings pending their forthcoming petition for certiorari.

JURISDICTION

Petitioners seek to stay proceedings following the judgment of the U.S. Court of Appeals for the District of Columbia Circuit, dated July 10, 2018. Petitioners timely filed a petition for rehearing en banc on September 7, 2018, which the D.C. Circuit denied, over a dissent by Judge Katsas, on June 18, 2019. On June 24, 2019, Germany moved for a stay of the mandate pending certiorari in the D.C. Circuit, which

denied the motion on July 11, 2019. The mandate issued to the District Court on July 16, 2019. This Court has jurisdiction and authority to entertain this application under 28 U.S.C. §§ 1254(1), 1651(a), and 2101(f).

OPINIONS BELOW

The District Court's opinion is reported at 248 F. Supp. 3d 59 (D.D.C. Mar. 31, 2019). The D.C. Circuit panel's merits decision is reported at 894 F.3d 406 (D.C. Cir. July 10, 2018), and attached as Appendix A to this application. The full en banc circuit court's denial of Petitioners' petition for rehearing en banc, along with Judge Katsas' dissent, is reported at 925 F.3d 1349 (D.C. Cir. June 18, 2019), and attached as Appendix B to this application.

STATEMENT

1. This case concerns ownership of the remaining part of a 17th Century collection of medieval reliquary art, known as the Welfenschatz, or Guelph Treasure, which was purchased by a consortium of art dealerships from Frankfurt, Germany ("the Consortium"), whose individual owners were Jewish, just weeks before the global stock market crash of October 1929. In the ensuing years of

global economic depression, the Consortium made great efforts to sell the collection, but succeeded in finding buyers for less than half of the pieces. In 1934, when the Nazi party had been in power for about a year, the Dresdner Bank made an offer for the remaining pieces of the Welfenschatz on behalf of the state of Prussia. The Consortium and the Bank negotiated for over a year, then agreed on a price of 4,250,000 RM (or $1,700,000).[4] Since 1935, the Welfenschatz has been on display in German public museums, including (for the past roughly sixty years) in SPK's museums in Berlin. In all those decades, no member or successor-in-interest of the Consortium made any claim to ownership of the works.

2. In 2008, some successors-in-interest of some members of the Consortium contacted SPK, claiming that the 1935 Welfenschatz sale occurred under duress and was therefore invalid. Germany takes such claims very seriously. In accordance with Germany's commitments under the Washington Conference Principles on Nazi-Confiscated Art, SPK investigated and determined that the sale was a voluntary, fair-

[4] Lawrence H. Officer, *Exchange Rates Between the United States Dollar and Forty-One Currencies* (2017), *available at* https://www.measuringworth.com/datasets/exchangeglobal/

market transaction.

At the claimants' request, the parties then mediated the claims before an independent commission (the "Advisory Commission") established by Germany in 2003, pursuant to the Washington Principles, to hear claims for restitution of Nazi-looted art. The Advisory Commission—which included the former chief justice of the Federal Constitutional Court of Germany, the former head of the German Parliament, and the first President of reunified Germany—concluded that the Welfenschatz was sold for fair market value following arms-length negotiations, not under duress, and the sale price reflected the effect of the world economic crisis on the art market. It therefore recommended that SPK retain the Welfenschatz.

3. Although others seeking restitution for alleged Nazi expropriations have sued for relief in German courts, the claimants here did not pursue judicial remedies in Germany. Instead, three of them, the Respondents, sued SPK and Germany in Washington, D.C., seeking restitution of the historical pieces or a quarter billion dollars in damages. The only connection between the Respondents' claims and the United States is that two of the three Respondents are now U.S.

citizens.

SPK and Germany moved to dismiss under the FSIA, as well as common-law principles of comity-based exhaustion and foreign-affairs preemption. The District Court denied the Motion to Dismiss in relevant part, *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 63–64 (D.D.C. 2017), but stayed the case and certified the issues for appeal. *Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84, 87–89 (D.D.C. 2017).

4. In the D.C. Circuit, SPK and Germany argued that the expropriation exception does not apply to a foreign state's alleged taking of its own nationals' property. *See* 28 U.S.C. § 1605(a)(3). SPK and Germany also argued that even if U.S. courts had jurisdiction over Respondents' claims, it would violate international comity to allow Respondents to sue in the U.S., without first giving German courts an opportunity to consider the claims here, which turn entirely on an allegedly coerced sales transaction, by German art dealers to a German state, occurring in Germany.

A panel of the D.C. Circuit issued a decision on July 10, 2018, affirming (in relevant part) the District Court's judgment. With respect

to immunity, the panel relied on *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C Cir. 2016). That decision recognized that "a foreign sovereign's taking of its own citizens' property . . . does not violate the international law of takings" and therefore ordinarily is not subject to the FSIA's expropriation exception, but concluded that a foreign state could nonetheless be sued in U.S. court for an alleged taking of its own nationals' property if the plaintiff alleged that the taking "amounted to the commission of genocide." *Philipp*, 894 F.3d at 410–11 (citing *Simon*, 812 F.3d at 145). Presuming the truth of the allegations that the Prussian state viewed the Consortium owners as enemies of the state and wished to "Aryanize" the Welfenschatz, the panel held that Respondents had adequately alleged a taking in violation of international law within the FSIA's expropriation exception. *Id.* at 413.[5]

The panel also rejected the comity-based abstention defense, holding that the FSIA precludes U.S. courts from declining to exercise jurisdiction based on international comity, even in cases where a plaintiff could have pursued claims in the foreign state's own courts. *Id.*

[5] The expropriation exception also requires "an adequate commercial nexus between the United States and the defendant." *Id.* The D.C. Circuit concluded that this requirement was satisfied with respect to SPK, but not Germany. *Philipp*, 894 F.3d at 414.

at 410. In so holding, the panel expressly rejected "the contrary position advanced by the United States" as amicus curiae in the *Simon* case, and also recognized that its holding conflicted with that of the Seventh Circuit in two recent decisions recognizing a comity-based exhaustion ground for dismissal. *Id.* at 416.

5. Petitioners filed a timely petition for rehearing en banc, and the court requested a response. On its own motion, the United States filed an amicus brief supporting rehearing en banc, in which it argued that the panel was wrong to conclude that the FSIA "leaves no room" for a court to abstain from exercising jurisdiction as a matter of international comity. *See Philipp* Amicus (Appendix C).

On June 18, 2019, the en banc court issued an order denying review. *See* Appendix B. Judge Katsas dissented, noting that the panel decision, along with the court's decisions in the *Simon* case against Hungary, "create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, [and] disregard the views of the Executive Branch on a matter of obvious foreign policy sensitivity." *Philipp*, 925 F.3d at 1350. (Katsas, J., dissenting). Judge Katsas further warned that these decisions "clear the way for a wide

range of litigation against foreign sovereigns for public acts committed within their own territories," far wider than the FSIA has ever been read to provide, and wider even than the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") allows for human rights abuses by private defendants. *Id.*

6. Defendants promptly moved for a stay of the mandate pending their filing of a cert petition in this Court. That application was denied without comment on July 11, 2019. The mandate issued on July 16, 2019, and, absent this Court's intervention, SPK will now have to submit to trial court litigation.

REASONS FOR GRANTING THE STAY

A stay is appropriate where there is "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (internal quotations omitted). Those factors are satisfied here.

I. There is a reasonable probability that this Court will grant certiorari.

Several factors suggest this Court is reasonably likely to grant Germany and SPK's forthcoming petition for certiorari. First, "actions

against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). For that reason, as well as to ensure "a uniform body of law in this area," *id.* at 489 (quoting H.R. Rep. No. 94-1487, at 32), this Court frequently reviews decisions affecting foreign sovereign immunity. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (2019); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018); *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012); *Samantar v. Yousuf*, 560 U.S. 305 (2010).

The concerns animating this Court's close and ongoing review of sovereign immunity doctrine are particularly acute in a case like this, where the decision dramatically expands the scope of the FSIA. *See Philipp*, 925 F.3d at 1350 (Katsas, J., dissenting) (noting that the panel decision "clears the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories" and creates significant risks for U.S. diplomatic relations).

Second, as the D.C. Circuit itself recognized, the decision below creates a split with the Seventh Circuit regarding the availability of international comity defenses in suits brought against foreign sovereigns in U.S. court. *See Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 857–58 (7th Cir. 2015). And, by denying immunity to a foreign state for an alleged taking of property from its own nationals within its own borders, the decision below is clearly in tension with the decisions of other circuits and of this Court. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (9th Cir. 1992) (holding that the expropriation exception did not permit suit against Argentina for alleged anti-Semitic theft and torture of its own nationals); *cf. Altmann*, 541 U.S. at 713 (2004) (Breyer, J., concurring) (recognizing "consensus view" of lower courts that the expropriation exception "does not cover expropriations of property belonging to a country's own nationals").

Finally, the United States has already argued that the panel's decision regarding international comity should be reversed. *See Philipp* Amicus (Appendix C). And the United States has previously argued against the interpretation of the FSIA's expropriation exception adopted by the D.C. Circuit below. *See Garb* Amicus (Appendix D) at 4; *see also*

Brief for Amicus Curiae the United States at 4, *In re Republic of Austria*, No. 02-3087 (2d. Cir. Dec. 20, 2002), 2002 WL 34636693, at *20-21 ("*Republic of Austria* Amicus") (explaining that "the restrictive theory of immunity adopted in the 1952 Tate Letter did not recognize an exception to immunity for suits based upon a foreign government's expropriation of property within its territory").

Given the centrality of the questions presented to the future of sovereign immunity and international comity, the risks to U.S. foreign relations, the split among the circuits, and the judgment's divergence from the views of the Executive Branch, there is at least a "reasonable probability" that four members of this Court will agree to hear this case.

II. There is a fair prospect that this Court will reverse.

A. There is a fair prospect that this Court will reverse the radical expansion of the FSIA expropriation exception.

Foreign sovereigns are immune from suit unless an FSIA exception applies. 28 U.S.C. § 1604. The expropriation exception provides jurisdiction when "rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3). For decades, the federal courts consistently accorded immunity to foreign sovereigns from claims that they had taken their own nationals' property, because

"expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." *Siderman de Blake*, 965 F.2d 699 (quoting *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985)) (internal quotation marks omitted); *accord Mezerhane v. Republica Bolivariana de Venez.*, 785 F.3d 545, 548–51 (11th Cir. 2015); Restatement (Third) of Foreign Relations Law of the United States § 712 (1987) ("Restatement Third") (recognizing that the international law of takings is only implicated by a state's taking of "the property of a national of another state"). Although this Court has never squarely addressed the issue, members of this Court have previously acknowledged this "consensus view" of the lower courts. *See Altmann*, 541 U.S. at 713 (Breyer, J., concurring).

The D.C. Circuit interpreted this exception to sovereign immunity much differently. Although the panel recognized that "a foreign sovereign's taking of its own citizens' property [] does not violate the international law of takings," it held that the expropriation exception stripped Germany and its instrumentality of immunity because Respondents asserted that a below-market sale of the Welfenschatz violated international *human rights* law, namely the international law

against genocide. *Philipp*, 894 F.3d at 410–11.

Stripped of all context, the expropriation exception could be read in a number of ways, but as Judge Katsas recognized below, "statutes must be construed in context," *Philipp*, 925 F.3d at 1351 (citation omitted); *see also Harrison*, 139 S. Ct. at 1056 (finding no jurisdiction under FSIA after reiterating that "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted). Here, numerous contextual factors, along with this Court's precedents narrowly construing other FSIA exceptions, compel a narrower reading.

1. The D.C. Circuit's interpretation of the expropriation exception would render the statute irrational. It has long been recognized that the FSIA contains no exception directly purporting to abrogate foreign sovereign's immunity for the murder, torture, or other serious violations of jus cogens, even against U.S. nationals, let alone against their own citizens. *See, e.g.*, *Princz v. Federal Republic of Ger.*, 26 F.3d 1166 (D.C. Cir. 1994). Congress has recognized as much. *See, e.g.*, H.R. Rep. No. 103-702, at 4 ("[T]he FSIA does not currently allow

U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil."). Yet according to the D.C. Circuit, Congress *did* abrogate the sovereign immunity of foreign states for human-rights abuses against their own nationals, but only when a plaintiff seeks compensation for damage to *property*. It makes little sense to think that Congress intended to create a remedy for foreign nationals to sue their own countries in the United States for violations of human rights that damage their *property* while states remain immune from claims of murder, torture, and other serious injuries to victims' bodies and minds.

What's more, the expropriation exception provides jurisdiction only when there is some connection between the property allegedly taken and the foreign sovereign's commercial activity in the United States. *See* 28 U.S.C. § 1605(a)(3) (requiring that taken property be "present in the United States" in connection with the foreign sovereign's own commercial activities here or "owned or operated by an agency or instrumentality" engaged in commercial activity here). It is irrational to think that Congress intended to abrogate foreign states' sovereign immunity for human-rights abuses related to property occurring

abroad, but only where the *property* allegedly taken (not the victim or the facts of the offense) had some connection with the United States.

2. The D.C. Circuit's interpretation also is at odds with two FSIA exceptions directly addressing injury or death—the type of injury international human-rights law primarily protects against. The first directly addresses claims "for personal injury or death," but only allows jurisdiction over foreign sovereigns for harms "occurring in the United States." 28 U.S.C. §1605(a)(5). The second allows claims against foreign sovereigns for personal injury or death outside the U.S., but it is very narrowly cabined, providing jurisdiction only over designated state sponsors of terror, and only for acts that result in injury or death of U.S. nationals, government employees or contractors. 28 U.S.C. § 1605A(a)(1). Given these careful explicit limitations, allowing such claims only when they are closely related to the United States, it makes little sense to conclude that Congress nevertheless implicitly intended the expropriation exception to allow claims against foreign sovereigns involving alleged human rights abuses against their own nationals—where the claim has no connection to the United States, and where it relates to damage to *property*.

3. The D.C. Circuit opinion construes the FSIA to violate the international law of sovereign immunity, contrary to the rule that federal statutes should, wherever possible, be interpreted in a manner consistent with international law. *See* Restatement Third § 114 (discussing the *Charming Betsy* canon). No "foreign state or international instrument provide[s] for removal of immunity for alleged violations of international law or jus cogens." Restatement (Fourth) of Foreign Relations Law of the United States § 455, note 12 (Tentative Draft No. 2, 2016). A few years ago, Italian courts chose to deviate from this principle of international law, exercising jurisdiction over Germany for the acts of the Nazis occurring within Italy and directed against Italian nationals during the 1940s. The International Court of Justice concluded that Italy's denial of sovereign immunity to Germany for these claims violated the customary international law of state sovereign immunity. *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), 2012 I.C.J.100, 145, 154-56 (Feb. 3, 2012); *see also id.* at 139 ("under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law"). The FSIA should

not be interpreted to violate clearly established customary international law, as the D.C. Circuit did below.

4. The judgment below conflicts with the views of the Executive, which has clearly stated that the expropriation exception "applies only to takings in violation of the international law of state responsibility and expropriation," not "the full range of international human rights law," *Garb* Amicus (Appendix D) at 4–5. and does not abrogate immunity for suits "based upon a foreign government's expropriation of property within its territory." *Republic of Austria* Amicus, at 20–21.

5. The broad interpretation of the expropriation exception is also at odds with this Court's repeated admonition to exercise "great caution" before adjudicating claims that require U.S. courts to determine whether a foreign sovereign's treatment of its own nationals within its own territory violated international human rights norms. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004) (courts should exercise "great caution" before interpreting statute to allow claims that would place "a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has

transgressed those limits"); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405–08 (2018) (courts should not hear claims against foreign corporations for alleged human rights violations abroad absent clear command from Congress); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (the presumption against extraterritoriality applies to claims under the ATS for violations of the law of nations occurring outside the United States). Although those admonitions arose in the context of the Alien Tort Statute, which pertains to suits against non-state actors, the underlying policy of "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord" and "ensur[ing] that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches," *Id.* at 115–16, applies with even greater force to judicial action that permits suits directly against the foreign sovereigns.

B. There is a fair prospect that this Court will reverse the novel holding that international comity is not a basis for the dismissal of unexhausted claims against foreign sovereigns.

Whatever the scope of the expropriation exception, courts have traditionally had the power to dismiss cases against foreign sovereigns

on the basis of international comity. The D.C. Circuit held here that the FSIA silently eliminated that longstanding rule of abstention. Even standing alone, that novel conclusion is cause for great concern, unsettling a longstanding federal doctrine animated by the separation of powers and the political branches' responsibility for foreign affairs. However, in combination with the D.C. Circuit's radical expansion of the expropriation exception, the decision creates an untenable situation: with one hand it creates a broad new reservoir of jurisdiction, and with the other hand it strips from district courts any discretion to limit the flow from the reservoir. The consequence will be that federal district courts will repeatedly be asked to determine as a threshold matter of jurisdiction whether foreign sovereigns have committed grave violations of international human rights law, and to do so only in order to reach the merits of property claims.

Foreign sovereigns have "a unique interest in resolving the ownership of" property allegedly taken illegally from their citizens, and "[t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). This case involves Respondents'

claims to an art collection their German predecessors sold—under duress, they allege—to a German state. The sale took place in Germany. The art remains in Germany, where it has been on display for decades in German public museums. Allowing Germany to resolve disputes about the ownership of this property accords completely with *Pimentel*. The D.C. Circuit does not disagree with the principles of *Pimentel*, or with the longstanding doctrine of comity. But it held that the FSIA "leaves no room" for comity-based exhaustion or abstention because the FSIA represents Congress's "comprehensive statement on foreign sovereign immunity." *Philipp*, 894 F.3d at 416.

The D.C. Circuit's rationale rests on a misinterpretation of this Court's decision in *Republic of Argentina v. NML Capital Ltd.*, 573 U.S. 134 (2014). There, the Court held that Congress intended the FSIA to provide a comprehensive framework for resolving any claim of sovereign immunity. *Id.* at 141. Since the FSIA does not expressly provide for exhaustion or abstention defenses, the *Philipp* panel reasoned, these defenses are implicitly foreclosed. *Philipp*, 894 F.3d at 415–16. But, as Judge Katsas pointed out below, "foreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-

jurisdictional defenses such as exhaustion and abstention." *Philipp*, 925 F.3d at 1356; *see also Philipp* Amicus (Appendix C) at 10 ("A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune."). Exhaustion and abstention are akin to forum non conveniens, the act-of-state doctrine, and the political-question doctrine, defenses that are not explicitly mentioned in the text of the FSIA and which survive its enactment. *See, e.g.*, *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005).

Indeed, *NML Capital* plainly stated that "we have no reason to doubt that … [a court] may appropriately consider comity interests" in determining whether a foreign sovereign must respond to discovery even when it is not immune from discovery under the FSIA. 134 S. Ct. at 2258 n.6; *see also Altmann,* 541 U.S. at 714 (Breyer, J., concurring) (noting, in a case arising under the expropriation exception, that "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.").

Moreover, as Judge Katsas observed, *Philipp*, 925 F.3d at 1355, the panel's elimination of exhaustion and abstention defenses is inconsistent with the text of the FSIA, which provides that "the foreign

state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Here, "a private individual under like circumstances" would be a defendant facing ATS claims of aiding and abetting violations of international human rights. *Id.* Courts have dismissed such claims against private defendants on the basis of comity-based exhaustion or abstention. *See e.g.*, *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion). Likewise, this Court has stated that "in an appropriate case," it "would certainly consider" whether claimants must exhaust domestic or international remedies before asserting an ATS claim in a U.S. court. *Sosa*, 542 U.S. 692, 733 n.21 (2004).

For these reasons, there is a fair prospect that this Court will conclude that the doctrine of comity requires a plaintiff to exhaust domestic remedies for expropriation before filing suit under the FSIA in the United States. At a minimum, there is a fair prospect that this Court will conclude that the longstanding doctrine of comity was not silently eliminated by the FSIA, and that district courts retain the discretion to consider comity as a basis for dismissal in cases brought under the expropriation exception.

III. The balance of equities favors granting a stay.

Sovereign immunity "is an immunity *from suit* rather than a mere defense to liability," *Metcalf & Eddy*, 506 U.S. at 144 (internal quotations omitted), and it is "effectively lost" when a "case is erroneously permitted to go to trial." *Id.* A sovereign forced to defend itself in a foreign court, without its consent, necessarily suffers irreparable harm to its sovereign dignity, which is why decisions denying Eleventh Amendment immunity are immediately appealable by the defendant states, *id.* at 146, and why every circuit court to consider the issue has "treat[ed] denials of sovereign immunity defenses as appealable collateral orders." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 667 (7th Cir. 2012) (collecting cases).

That harm cannot be remediated. If SPK is forced to litigate the case below while this Court considers whether the case belongs in a U.S. court at all, even winning on the merits would not vindicate Petitioners' "dignitary interests" in remaining free from suit in another sovereign's court. *Cf. id.* at 145 (acknowledging that "the value to the States of their Eleventh Amendment immunity…is for the most part

lost as litigation proceeds past motion practice").[6]

By contrast, Respondents will suffer no additional harm from a short stay while this Court considers the certiorari petition. Respondents are not elderly survivors; they are successors-in-interest, a generation or two removed from the members of the consortium. *Contra Simon v. Republic of Hung.*, Case No. 17-7146 (order dated Mar. 15, 2019) (denying motion to stay, after referral to full Court, where plaintiffs were living Holocaust survivors). Nor would a temporary stay harm Respondents' ability to effectively litigate this case. Eighty years after the events at issue, there are no known witnesses alive whose testimony could be lost or whose memories could fade. Instead, litigation would necessarily be based on documentary evidence and expert opinions, which would not be affected by a brief delay. Moreover,

[6] Apart from the irreparable dignitary harm Petitioners would suffer in the absence of a stay, they will also face substantial and unrecoverable costs if forced to litigate this action in the District Court while their cert petition is pending. Discovery here will be transnational, with nearly all documentary evidence in other languages, covering events many decades old, involving people and documents located in a foreign nation and governed by its laws, and requiring expert witnesses on historical events and practices as well as foreign law and translation. Discovery, of course, is one of the "attendant burdens of litigation" against which immunity doctrines protect. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

it would be disingenuous for Respondents to complain of a brief delay when they and their predecessors-in-interest allowed many decades to pass without raising any claim—all while the Welfenschatz remained on public display in German museums. So many years after the fact, there can be no principled reason why the matter must be litigated in a rush, before this Court can consider whether it should be litigated here at all.

Finally, the public interest favors a stay. Petitioners generally agree that it is in the public interest to promptly resolve claims arising out of the Nazi era. For that reason, they promptly investigated the claim and then agreed with Respondents to submit it to the Advisory Commission. After that independent body issued an opinion on the merits, concluding that the sale here was not, in fact, made under duress relating to the Nazi era, Respondents filed suit in the U.S. The certiorari petition will ask this Court to decide whether doctrines of jurisdiction and comity permit such suit, but there is no public interest in hasty resolution on the merits of second-bite litigation against a foreign sovereign, where the merits were already heard elsewhere, and where jurisdiction and comity are in dispute.

By contrast, pressing forward with the underlying litigation while this Court considers whether such a suit against a foreign sovereign can even be entertained would not serve the public interest. It would undermine the foreign relations of the United States, as the Executive Branch has explained in its amicus brief below supporting Petitioners. *See Philipp* Amicus (Appendix C). It would leave in disarray the law of sovereign immunity and international comity, allowing litigation to proceed in this case—and potentially others—on an upended playing board. And it would impose on both the district court and the foreign sovereign complex discovery and attendant motion practice involving issues that, as *NML Capital* recognizes, themselves implicate international comity interests.

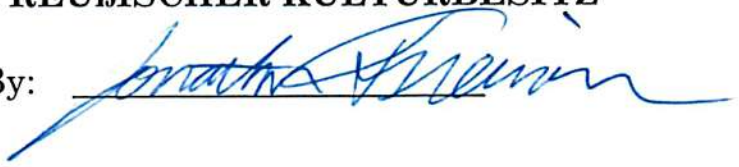
CONCLUSION

The Court should stay proceedings below pending the timely filing and disposition of a petition for certiorari.

Dated: July 26, 2019

Respectfully submitted,

PETITIONERS
FEDERAL REPUBLIC OF
GERMANY AND STIFTUNG
PREUßISCHER KULTURBESITZ

By: 

Jonathan M. Freiman
Counsel of Record
Tahlia Townsend
Benjamin M. Daniels
David R. Roth
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

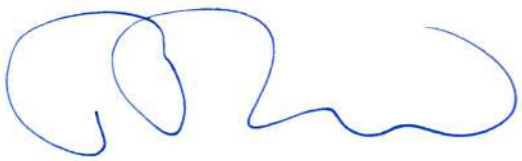
David L. Hall
Wiggin and Dana LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2019, I have caused an original and two copies of the *Application to Stay Proceedings Pending Disposition of a Petition for a Writ of Certiorari* to be hand-delivered to the Clerk's Office at the Supreme Court of the United States pursuant to Rule 22.2. I have also caused a copy to be served on the following counsel of record via e-mail and U.S. mail, postage pre-paid, pursuant to Rule 29.5(b).

Nicholas M. O'Donnell
Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109
Telephone: (617) 338-2800
Facsimile: (617) 338-2880
Email: nodonnell@sandw.com

Attorney of record for Respondents Alan Philipp, Gerald G. Stiebel, and Jed R Leiber



By: _____

Tahlia Townsend
Wiggin and Dana LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400

Counsel for Petitioners Federal Republic of Germany and Stiftung Preußischer Kulturbesitz

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7064 **September Term, 2018**

1:15-cv-00266-CKK

Filed On: July 11, 2019

Alan Philipp, et al.,

Appellees

v.

Federal Republic of Germany, a foreign state and Stiftung Preussischer Kulturbesitz,

Appellants

Consolidated with 17-7117

BEFORE: Tatel, Griffith, and Wilkins, Circuit Judges

O R D E R

Upon consideration of appellants' motion to stay mandate pending filing of a petition for certiorari, the opposition thereto, and the reply, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 2018 Decided July 10, 2018

No. 17-7064

ALAN PHILIPP, ET AL.,
APPELLEES

v.

FEDERAL REPUBLIC OF GERMANY AND STIFTUNG PREUSSISCHER KULTURBESITZ,
APPELLANTS

Consolidated with 17-7117

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cv-00266)

Jonathan M. Freiman argued the cause for appellants. With him on the briefs were *Benjamin M. Daniels*, *David R. Roth*, and *David L. Hall*.

Nicholas M. O'Donnell argued the cause and filed the brief for appellees.

Gary A. Orseck, *Ariel N. Lavinbuk*, *Daniel N. Lerman*, and *D. Hunter Smith* were on the brief for *amicus curiae* David Toren in support of appellees.

Before: TATEL, GRIFFITH, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case, the heirs of several Jewish art dealers doing business in Frankfurt, Germany in the 1930s seek to recover a valuable art collection allegedly taken by the Nazis. Defendants, the Federal Republic of Germany and the agency that administers the museum where the art is now exhibited, moved to dismiss, claiming immunity from suit under the Foreign Sovereign Immunities Act. They also argued that the heirs failed to exhaust their remedies in German courts and that their state-law causes of action are preempted by United States foreign policy. The district court rejected all three arguments and denied the motion to dismiss. For the reasons set forth below, we largely affirm.

I.

Because this appeal comes to us from the district court's ruling on a motion to dismiss, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013) (internal quotation marks omitted). Viewed through that lens, the complaint relates the following events:

In 1929, three Frankfurt-based firms owned by Jewish art dealers joined together into a "Consortium" and purchased "a unique collection of medieval relics and devotional art" called the Welfenschatz. First Amended Compl. (FAC) ¶ 1, *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 1:15-cv-00266); *see id.* ¶¶ 34–35. The treasure—or "schatz"—acquired its name due to its association with the House of Welf, an ancient European dynasty. *See id.* ¶ 30.

Dating primarily from the eleventh to fifteenth centuries, the several dozen pieces that make up the Welfenschatz were housed for generations in Germany's Brunswick Cathedral. *See id.* After displaying the Welfenschatz throughout Europe and the United States and selling a few dozen pieces, the Consortium placed the remainder of the collection, which at that time retained about eighty percent of the full collection's value, into storage in Amsterdam. *Id.* ¶¶ 41, 78.

The heirs allege that "[a]fter the [1933] Nazi-takeover of power in Germany, . . . the members of the Consortium faced catastrophic economic hardship," *id.* ¶ 10, and in 1935, following "two years of direct persecution" and "physical peril to themselves and their family members," *id.* ¶ 145, the Consortium sold the Welfenschatz to the Nazi-controlled State of Prussia for 4.25 million Reichsmarks (the German currency at the time), *id.* ¶¶ 145–160, "barely 35% of its actual value," *id.* ¶ 12. "Standing behind all of this was [Hermann] Goering," *id.* ¶ 73, "Prime Minister of Prussia at that time," *id.*, a "notorious racist and anti-Semite," *id.* ¶ 74, and "legendary" art plunderer, *id.* ¶ 75. Goering "seldom if ever" seized outright the art he desired, preferring "the bizarre pretense of 'negotiations' with and 'purchase' from counterparties with little or no ability to push back without risking their property or their lives." *Id.* The Welfenschatz was then shipped from Amsterdam to Berlin, *see id.* ¶ 157, where Goering presented it to Adolf Hitler as a "surprise gift," *id.* ¶ 179 (quoting *Hitler Will Receive $2,500,000 Treasure*, Balt. Sun, Oct. 31, 1935, at 2). All but one of the Consortium members then fled the country. *See id.* ¶¶ 163, 170–171. The remaining member died shortly after, officially of "cardiac insufficiency," *id.* ¶ 163, but "rumors" circulated that he was "dragged to his death through the streets of Frankfurt by a Nazi mob," *id.* ¶ 166.

"After the war, [the Welfenschatz] was seized by U.S. troops," *id.* ¶ 181, and eventually turned over to appellant Stiftung Preussischer Kulturbesitz (SPK), a German agency formed "for the purpose . . . of succeeding to all of Prussia's rights in cultural property," *id.* ¶ 184; *see id.* ¶¶ 181–84. The Welfenschatz is now exhibited in an SPK-administered museum in Berlin. *Id.* ¶ 26(iv).

In 2014, appellees, Alan Philipp, Gerald Stiebel, and Jed Leiber, heirs of Consortium members, sought to recover the Welfenschatz, and they and the SPK agreed to submit the claim to a commission that had been created pursuant to the Washington Conference Principles on Nazi–Confiscated Art, *id.* ¶ 220, an international declaration that "encouraged" nations "to develop . . . alternative dispute resolution mechanisms" for Nazi-era art claims, *id.* ¶ 197 (quoting U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art ¶ 11 (1998) [hereinafter Washington Principles]). Known as the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, *id.* ¶ 205, the Advisory Commission concluded "that the sale of the Welfenschatz was not a compulsory sale due to persecution" and it therefore could "not recommend the return of the Welfenschatz to the heirs," Advisory Commission, *Recommendation Concerning the Welfenschatz (Guelph Treasure)* (Mar. 20, 2014), Appellants' Supp. Sources 7; *see also* FAC ¶ 221.

Seeking no further relief in Germany, the heirs filed suit in the United States District Court for the District of Columbia against the Federal Republic of Germany and the SPK (collectively, "Germany"), asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. *See* FAC ¶¶ 250–304. They sought

the return of the Welfenschatz "and/or" 250 million dollars, *id.* Prayer for Relief, a "conservative estimate[]" of its value, *id.* ¶ 33. Germany moved to dismiss, arguing that it enjoyed immunity from suit under the Foreign Sovereign Immunities Act (FSIA), that international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts, and that United States foreign policy preempted the heirs' state-law causes of action. The district court rejected all three arguments and, aside from a few uncontested issues, denied the motion to dismiss. *Philipp*, 248 F. Supp. 3d at 87.

Germany appealed the district court's FSIA determination as of right. *See Owens v. Republic of Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008) ("[W]hen . . . a denial [of a motion to dismiss] subjects a foreign sovereign to jurisdiction, the order is 'subject to interlocutory appeal.'" (quoting *El–Hadad v. United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000))). On Germany's motion, the district court certified the other two issues for interlocutory appeal, *Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84 (D.D.C. 2017), and this court granted Germany's petition to present them now, Per Curiam Order, *In re Federal Republic of Germany*, No. 17-8002 (D.C. Cir. Aug. 1, 2017). Reviewing *de novo*, we address Germany's immunity, comity, and preemption arguments in turn.

II.

Under the FSIA, foreign sovereigns and their agencies enjoy immunity from suit in United States courts unless an expressly specified exception applies. 28 U.S.C. § 1604. The heirs assert jurisdiction under the statute's "expropriation exception," *see id.* § 1605(a)(3), which "has two requirements": that "'rights in property taken in violation of international law are in issue,'" and that "there is an adequate commercial nexus between the United States and the

defendant[],” *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017) (quoting 28 U.S.C. § 1605(a)(3)). Germany “bears the burden of proving that [the heirs’] allegations do not bring [the] case within” the exception. *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

A.

As to the expropriation exception’s first requirement, we explained in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), that although an “intrastate taking”—a foreign sovereign’s taking of its own citizens’ property—does not violate the international law of takings, *id.* at 144, an intrastate taking can nonetheless subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking “amounted to the commission of genocide,” *id.* at 142. This, we explained, is because “[g]enocide perpetrated by a state,” even “against its own nationals[,] . . . is a violation of international law.” *Id.* at 145. In so holding, we adopted the definition of genocide set forth in the Convention on the Prevention of the Crime of Genocide. *Id.* at 143. “[A]dopted by the United Nations in the immediate aftermath of World War II,” *id.*, the Convention defines genocide, in relevant part, as “[d]eliberately inflicting” on “a national, ethnical, racial or religious group . . . conditions of life calculated to bring about its physical destruction in whole or in part,” Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

In *Simon*, “survivors of the Hungarian Holocaust,” 812 F.3d at 134, alleged that in 1944–45 Hungary “forced all Jews into ghettos, . . . confiscating Jewish property” in the process, *id.* at 133, and then “transport[ed] Hungarian Jews to death camps, and, at the point of embarkation, confiscate[d] [their remaining] property,” *id.* at 134. Assuming the truth of these

allegations—like here, the case came to us from a ruling on a motion to dismiss—we held that because the allegations of "systematic, wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people . . . describe[d] takings of property that are *themselves* genocide within the legal definition of the term," *id.* at 143–44 (internal quotation marks omitted), they "fit[] squarely within the terms of the expropriation exception," *id.* at 146.

A year later, in *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), we considered claims by the heirs of a Jewish collector whose art was seized by the "Hungarian government and its Nazi collaborators," *id.* at 1097. We held, among other things, that plaintiffs could pursue their "bailment" claim for return of the art. *Id.* at 1103. The case, we explained, was "just like *Simon*." *Id.* at 1102. "Here, as there, Hungary seized Jewish property during the Holocaust. Here, as there, plaintiffs bring 'garden-variety common-law' claims to recover for that taking." *Id.*

In today's case, the heirs argue that, after *Simon* and *de Csepel*, "[i]t is beyond serious debate that Nazi Germany took property in violation of international law by systematically targeting its Jewish citizens to make their property vulnerable for seizure." Appellees' Br. 27. The district court agreed, concluding that, "like in *Simon*, the taking of the Welfenschatz as alleged in the complaint bears a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law." *Philipp*, 248 F. Supp. 3d at 71. Germany disagrees, insisting that "[t]he allegations here have little in common with the *Simon* allegations except that they happened under Nazi rule." Appellants' Br. 35. According to Germany, four differences between this case and *Simon* compel a different result.

First, Germany argues that unlike in *Simon*, where the Nazis confiscated "food, medicine, clothing, [or] housing," here they seized art. *Id.* at 40. Although *de Csepel* also involved a seizure of art, we had no need to decide then whether *Simon* applied because the Hungarian government had conceded that the seizure there was genocidal, see *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 164 (D.D.C. 2016). Thus, we are asked for the first time whether seizures of art may constitute "takings of property that are themselves genocide." *Simon*, 812 F.3d at 144 (emphasis omitted). The answer is yes.

Congress has twice made clear that it considers Nazi art-looting part of the Holocaust. In enacting the Holocaust Victims Redress Act, which encouraged nations to return Nazi-seized assets, Congress "f[ound]" that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish . . . heritage." Holocaust Victims Recovery Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 15 (1998). And in the Holocaust Expropriated Art Recovery Act (HEAR Act), which extended statutes of limitation for Nazi art-looting claims, Congress again "f[ound]" 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." Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524 (emphasis added).

In this case, moreover, the Welfenschatz was more than just art. As Germany acknowledges, "the Consortium bought [the Welfenschatz] not for pleasure or display, but as business inventory, to re-sell for profit." Appellants' Br. 12. By seizing businesses' inventory—like the other economic pressures alleged in the complaint, such as the "boycott of Jewish-owned

businesses," FAC ¶ 58, and "exclu[sion]" of Jews from certain professions, *id.* ¶ 120—the Nazis "dr[ove] Jews out of their ability to make a living," *id.* ¶ 61, and thereby, in the words of the Genocide Convention, "inflict[ed] . . . conditions of life calculated to bring about [a group's] physical destruction in whole or"—at the very least—"in part," Genocide Convention art. 2(c).

Second, Germany argues that whereas *Simon* involved a "forcible deprivation" of property, Appellants' Br. 40, this case involves only a "forced sale . . . for millions of Reichsmarks," *id.* at 42. For purposes of this appeal, however, Germany concedes that the forced sale qualifies as a "tak[ing]," *id.* at 28 n.12, and it offers no reason why a taking by forced sale cannot qualify as a genocidal taking. Indeed, the heirs' allegations—allegations that, we repeat, we must accept as true at this stage of the litigation—support just that conclusion. According to the complaint, Goering "routinely went through the bizarre pretense of 'negotiations' with and 'purchase' from" powerless counterparties. FAC ¶ 75. In addition, the heirs allege, the Nazis made it impossible for Jewish dealers to sell their art on the open market. Jewish art dealers' "means of work" were "effectively end[ed]," and "[m]ajor dealers' collections were liquidated because they could not legally be sold." *Id.* ¶ 120. "Jewish art dealers . . . lost" even "their Jewish customers," because, as a result of the crippling economic policies, "there was no money left to buy art." *Id.* ¶ 124. "By spring of 1935," the heirs allege, "the exclusion of Jews from . . . German life . . . had become nearly total. The means by which German art could be sold by Jewish dealers had effectively been eliminated." *Id.* ¶ 138. It was within that context, the heirs allege, that the Nazis pressured the Consortium to sell the Welfenschatz for well below market value. *Id.* ¶ 139. "The Consortium had," the heirs allege, "only one option." *Id.* ¶ 145.

Fearful of losing the entire value of their property, or worse, the Consortium acquiesced. *Id.* ¶ 139.

Third, Germany claims that "conditions for Hungarian Jews in 1944–45"—the period of time at issue in both *Simon* and *de Csepel*—"were far different from conditions for German Jews nearly a decade earlier, in the summer of 1935." Appellants' Br. 40 n.23. The sale of the Welfenschatz, Germany points out, predated "the Nuremberg Laws, . . . the Decree on the Elimination of the Jews from Economic Life . . . , and . . . the mass murder of German Jews." *Id.*

In *Simon*, however, we explained that the "Holocaust proceeded in a series of steps." *Simon*, 812 F.3d at 143. "'The Nazis . . . achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies.'" *Id.* at 144 (alterations in original) (quoting Complaint ¶ 91, *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 1:10-cv-1770)). Although the events at issue in *Simon* occurred at the later steps of the Holocaust, *i.e.*, ghettoization and deportation, and the events at issue here occurred at the earlier steps, *i.e.*, isolation and expropriation, both are "steps" of the Holocaust, *id.* at 143. And, as the heirs allege, those earlier steps began as early as 1933, more than two years before the Nazis seized the Welfenschatz. Specifically, the heirs allege that the Nazis rose to power in the early 1930s by "blam[ing] Jews for any and all economic setbacks," FAC ¶ 48, and once in power, "encourage[d]" the "boycotts of Jewish businesses [that] spread in March and April 1933, just weeks after Hitler's ascension," *id.* ¶ 58. Moreover, the 1933 "found[ing] [of] the Reich Chamber of Culture," which "assumed total control over cultural trade" and excluded Jews, "effectively end[ed] the means of work for any Jewish art dealer in one stroke." *Id.*

¶ 120. The heirs also allege that outright violence against German Jews began several years before the seizure, including that "[b]y the spring 1933, . . . the murder of Jews detained [in the Dachau concentration camp] went unprosecuted." *Id.* ¶ 59.

Moreover, in two statutes dealing with Nazi-era art-looting claims, Congress has expressly found that the Holocaust began in 1933. In the first statute—the very section of the FSIA at issue here—Congress provided jurisdictional immunity for certain art exhibition activities, 28 U.S.C. § 1605(h), but created an exception for art taken during the "Nazi[] era," defined as beginning in January 1933, *id.* § 1605(h)(2)(A). In the second, the HEAR Act, Congress again defined January 1933 as the beginning of the Nazi era. HEAR Act § 4 (defining "covered period" as "beginning on January 1, 1933").

The heirs' position finds further support in a timeline on the website of the United States Holocaust Memorial Museum, which Germany itself cites for its observation that the taking of the Welfenschatz predated the Nuremburg Laws. *See* Appellants' Br. 40 n.23. That same timeline demonstrates that, by the time of the taking in 1935, the Nazi government had already opened the Dachau concentration camp, excluded Jews from all civil-service positions, and organized a nationwide boycott of Jewish-owned businesses.

Fourth, emphasizing that the definition of genocide includes an "*intent* to destroy," Genocide Convention art. 2(c) (emphasis added), Germany argues that this case differs from *Simon* because unlike there, where the plaintiffs alleged that the takings were "*aimed* to deprive Hungarian Jews of the resources needed to survive as a people," *Simon*, 812 F.3d at 143, here the heirs allege that the Nazis wanted the Welfenschatz because it was "historically, artistically and national-politically valuable," FAC ¶ 111. Elsewhere in the

complaint, however, the heirs make clear that "[the Nazis] took the collection from [the Consortium] in order to 'Aryanize' [it]." *Id.* ¶ 25(iv). More specifically, the heirs allege that "the collection was wrongfully appropriated not least because [the Consortium members] were regarded as state's enemies for holding the iconic Welfenschatz," *id.* ¶ 25(ii), that "the Gestapo[] opened files on the members of the Consortium because of their ownership of the Welfenschatz and their prominence and success," *id.* ¶ 67, and that "Prussian interest in the Welfenschatz was . . . revived . . . [once] the Consortium was . . . vulnerable," *id.* ¶ 68. In short, the heirs have sufficiently alleged that in seizing the Welfenschatz the Nazis were motivated, at least in part, by a desire "to deprive [German] Jews of the resources needed to survive as a people." *Simon*, 812 F.3d at 143.

Finally, unable to demonstrate that this case falls outside *Simon*'s reach, Germany warns that allowing this suit to go forward will "dramatically enlarge U.S. courts' jurisdiction over foreign countries' domestic affairs" by stripping sovereigns of their immunity for any litigation involving a "transaction from 1933–45 between" a Nazi-allied government and "an individual from a group that suffered Nazi persecution." Appellants' Br. 42–43. But as we have just explained, our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific—and unchallenged—allegations that the Nazis *took* the art in *this* case from *these* Jewish collectors as part of their effort to "drive[] [Jewish people] out of their ability to make a living." FAC ¶ 61. Because Germany has failed to carry its burden of demonstrating that these allegations do not bring the case within the expropriation exception as defined and applied in *Simon*, the district court properly denied Germany's motion to dismiss.

B.

In *Simon* we held that, with respect to foreign states (but not their instrumentalities), the expropriation exception's second requirement—"an adequate commercial nexus between the United States and the defendant[]," *de Csepel*, 859 F.3d at 1101—is satisfied only when the property is present in the United States. *Simon*, 812 F.3d at 146. Because the *Simon* plaintiffs had offered but a "bare, conclusory assertion" to that effect, we dismissed the Republic of Hungary from the action. *Id.* at 148. We faced the same issue in *de Csepel* because the art at issue there was not in the United States. *de Csepel*, 859 F.3d at 1107. Bound by *Simon*, we again dismissed the Republic of Hungary. *Id.*

Relying on *Simon* and *de Csepel*, Germany argues that because the Welfenschatz is in Berlin, not the United States, the Federal Republic of Germany must be dismissed. Although the heirs initially urged us to "reverse course on th[is] question," Appellees' Br. 34, as they acknowledged at oral argument, this panel is bound by *Simon* and *de Csepel*, Oral Arg. 50:14–40. Accordingly, on remand, the district court must grant the motion to dismiss with respect to the Federal Republic of Germany—but not the SPK, an instrumentality for which the commercial-nexus requirement can be satisfied without the presence of the Welfenschatz in the United States. *See de Csepel*, 859 F.3d at 1007 (explaining that "an agency or instrumentality loses its immunity if" the agency or instrumentality owns or operates the property at issue and is engaged in commercial activity in the United States).

III.

In *Simon*, we left open the question whether a court, despite having jurisdiction over an expropriation claim, "nonetheless should decline to exercise [it] as a matter of

international comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so)." *Simon*, 812 F.3d at 149. In arguing that the answer to that question is yes, Germany does not claim, as it did in the district court, that we should defer to the Advisory Commission's refusal to recommend the return of the Welfenschatz, *see Philipp*, 248 F. Supp. 3d at 81. Instead, Germany argues that the heirs must "exhaust [their] remedies against [Germany] in [its] courts before pressing a claim against it elsewhere." Appellants' Br. 65. "'[B]ypass[ing] [its] courts,'" Germany insists, would "undermine [its] 'dignity [as] a foreign state.'" *Id.* at 68 (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)). The district court rejected this argument, as do we.

The key case is the Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), where Argentina claimed immunity from post-judgment discovery as a matter of international comity. The Court rejected that claim because nothing in the FSIA's plain text provided for such immunity. *Id.* at 2255. As the Court explained, although courts once decided on a case-by-case basis whether to grant foreign states immunity as matter of international comity, "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Id.* (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). "[A]fter the enactment of the FSIA," the Court continued, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)). Going forward, "any sort of immunity defense made by a foreign

sovereign in an American court must stand on the Act's text. Or it must fall." *Id.*

Acknowledging that nothing in the text of the FSIA's expropriation exception requires exhaustion, Germany argues that applying *NML Capital* here "confuses immunity from jurisdiction with non-immunity common-law doctrines." Appellants' Reply Br. 38. The FSIA, Germany points out, operates as a pass-through, "granting jurisdiction yet leaving the underlying substantive law unchanged." *Id.* at 39 (quoting *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017)). As Germany emphasizes, FSIA section 1606 provides that foreign states not entitled to immunity, "shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 38 (quoting 28 U.S.C. § 1606). According to Germany, "exhaustion is a non-jurisdictional common-law doctrine," that, like forum non conveniens, "'remains fully applicable in FSIA cases.'" *Id.* at 39 (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002)).

Germany's effort to circumvent *NML Capital* fails for several reasons. To begin with, although a different provision of the FSIA, its terrorism exception, conditions jurisdiction on the claimant "afford[ing] the foreign state a reasonable opportunity to arbitrate the claim," 28 U.S.C. § 1605A(a)(2)(A)(iii), no such requirement appears in the expropriation exception, and we have long recognized "the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 948 (D.C. Cir. 2008). Moreover, far from demonstrating that the FSIA leaves room for an exhaustion requirement, the very FSIA provision that Germany relies on, section 1606,

forecloses that possibility. By its terms, that provision permits only defenses, such as forum non conveniens, that are equally available to "private individual[s]," 28 U.S.C. § 1606. Obviously a "private individual" cannot invoke a "*sovereign's* right to resolve disputes against it." Appellants' Br. 68 (emphasis added).

To be sure, the Seventh Circuit, in a case similar to *Simon*, required the plaintiffs—survivors of the Hungarian Holocaust and the heirs of other victims—to "exhaust any available Hungarian remedies or [show] a legally compelling reason for their failure to do so," *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015). In doing so, the court distinguished *NML Capital*, holding that "defendants need not rely on . . . the FSIA," but may "invoke the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity." *Id.* at 859. The Seventh Circuit drew that "well-established rule" from a provision of the Third Restatement of Foreign Relations Law of the United States, but as this court has explained, that "provision addresses claims of one state against another," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 949 (D.C. Cir. 2008). Confirming that interpretation, the tentative draft of the Fourth Restatement explains that "the rule cited by the [Seventh Circuit] applies by its terms to 'international . . . proceedings,'" Restatement (Fourth) of Foreign Relations Law of the United States § 455 Reporters' Note 9 (Am. Law Inst., Tentative Draft No. 2, 2016)—*i.e.*, "nation vs. nation litigation," *Chabad*, 528 F.3d at 949; *see also Agudas Chasidei Chabad of U.S. v. Russian Federation*, 466 F. Supp. 2d 6, 21 (D.D.C. 2006) ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept."). And as we explained above, the FSIA, Congress's "comprehensive" statement of foreign sovereign immunity, which "is, and always has been, a 'matter

of grace and comity,'" *NML Capital*, 134 S.Ct. at 2255 (quoting *Verlinden*, 461 U.S. at 486), leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity.

In so concluding, we have considered the contrary position advanced by the United States in an amicus brief recently filed before a different panel of this court, where it argued that "[t]he fact [that] the FSIA itself does not impose any exhaustion requirement for expropriation claims . . . does not foreclose dismissal on international comity grounds." Brief of United States as Amicus Curiae at 14–15, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2017). This position, of course, is flatly inconsistent with *NML Capital*, a case the government fails to cite, relying instead on non-FSIA cases, *see id.* at 15. Accordingly, nothing in the government's brief alters our conclusion that the heirs have no obligation to exhaust their remedies in Germany.

Germany protests that, as a "staunch U.S. ally," it "deserves the chance to address [the heirs'] attacks" in its own courts. Appellants' Br. 77. As the Court made clear in *NML Capital*, however, such "apprehensions are better directed to that branch of government with authority to amend the [FSIA]." *NML Capital*, 134 S. Ct. at 2258.

IV.

This brings us, finally, to Germany's argument that the heirs' state-law causes of action—replevin, conversion, unjust enrichment, and bailment—conflict with, and thus are preempted by, United States foreign policy. In support, Germany cites the Washington Principles, which "encouraged" nations "to develop . . . alternative dispute-resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, as well the Terezin Declaration, a follow-up

agreement also urging alternative dispute resolution. According to Germany, "letting [the heirs] press [the] same claims" they already presented to the Advisory Commission "again in a U.S. court" may cause signatories to the Washington Principles to "question whether [they] should follow the [] Principles," thereby "undermin[ing] the considerable diplomatic effort that the U.S. devoted to them." Appellants' Br. 56–57.

Germany relies principally on two cases, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In *Garamendi*, the Supreme Court began by reiterating the basic rule that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Garamendi*, 539 U.S. at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). Applying that rule to the facts of the case before it, the Court found California's attempt to regulate Holocaust-era insurance claims preempted by "the foreign policy of the Executive Branch, as expressed principally in . . . executive agreements with Germany, Austria, and France." *Id.* In those executive agreements, the United States had "promised to use its 'best efforts, in a manner it considers appropriate,' to get state and local governments to respect [an internal dispute resolution process] as the exclusive mechanism.'" *Id.* at 406 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Ger.-U.S., July 17, 2000, 39 I.L.M. 1298, 1300). In particular, the United States agreed that in any case involving Holocaust-era insurance claims, it would submit a statement "'that U.S. policy interests favor dismissal on any valid legal ground.'" *Id.*

(quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 I.L.M. at 1304). Acknowledging that the executive agreements contained no preemption clause, the Court nonetheless concluded that the "express federal policy and the clear conflict raised by the [California] statute. . . require[d] state law to yield." *Id.* at 425.

Similarly, in *Crosby*, the Court found Massachusetts's regulation of commerce with Burma to be "an obstacle to the accomplishment of Congress's full objectives under [a] federal Act" that imposed some economic sanctions on Burma and gave the President discretion to impose more. 530 U.S. at 373. The Massachusetts law, the Court explained, by "imposing a different, state system of economic pressure against the Burmese political regime," could "blunt the consequences of discretionary Presidential action," *id.* at 376.

This case is very different. Although the Washington Principles and Terezin Declaration both "encourage[]" nations "to develop . . . alternative dispute resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, neither requires that the alternative mechanisms be *exclusive* or otherwise "takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art." Brief of United States as Amicus Curiae at 18, *Saher v. Norton Simon Museum of Art at Pasadena*, 131 S. Ct. 3055 (2011) (No. 09-1254), 2011 WL 2134984, at *18. Unlike in *Garamendi*, where the President promised to seek "dismissal on any valid legal ground," 539 U.S. at 406 (internal quotation marks omitted), or in *Crosby*, where the state law at issue "blunt[ed]" the force of discretion Congress had explicitly granted the President, 530 U.S. at 376, here, as the district court explained, there is no "direct conflict between the property-based common law

claims raised by Plaintiffs and [United States] foreign policy," *Philipp*, 248 F. Supp. 3d at 78.

Indeed, far from adopting, as in *Garamendi*, an "express federal policy," 539 U.S. at 425, of disfavoring domestic litigation of Nazi-era art-looting claims, the United States has repeatedly made clear that it *favors* such litigation. Congress, as explained above, *see supra* at 8, recently extended statutes of limitation for Nazi-era art-looting claims, *see* HEAR Act § 4, and the FSIA exempts them from the jurisdictional immunity otherwise afforded certain art collections temporarily exhibited in the United States, *see* 28 U.S.C. § 1605(h)(1)–(3).

V.

For the foregoing reasons, we affirm the district court's denial of the motion to dismiss, except that on remand, the district court must, as required by *Simon* and *de Csepel*, grant the motion to dismiss with respect to the Federal Republic of Germany.

So ordered.

Appendix B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: June 18, 2019

No. 17-7064

ALAN PHILIPP, ET AL.,
APPELLEES

v.

FEDERAL REPUBLIC OF GERMANY, A FOREIGN STATE AND
STIFTUNG PREUSSISCHER KULTURBESITZ,
APPELLANTS

Consolidated with 17-7117

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cv-00266)

On Petition for Rehearing En Banc

Before: GARLAND, *Chief Judge*; HENDERSON, ROGERS, TATEL, GRIFFITH, SRINIVASAN, MILLETT, PILLARD, WILKINS, KATSAS**, AND RAO*, *Circuit Judges*.

O R D E R

Appellants' petition for rehearing en banc, the response thereto, and the amicus curiae brief in

support of rehearing en banc were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

* Circuit Judge Rao did not participate in this matter

** A statement by Circuit Judge Katsas, dissenting from the denial of rehearing en banc, is attached.

KATSAS, *Circuit Judge*, dissenting from the denial of rehearing en banc:

The panel decision in this case, together with *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) (*Simon I*), and *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (*Simon II*), makes the district court sit as a war crimes tribunal to adjudicate claims of genocide arising in Europe during World War II. The basis for these decisions is not any federal statute authorizing a private right of action for victims of foreign genocide, nor even any statute punishing foreign genocide under United States law. Rather, these decisions rest on a statute abrogating the jurisdictional immunity of foreign sovereigns from claims for unlawful takings of property. As a result, the district court must hear genocide claims against foreign sovereigns, but only to determine whether it has subject-matter jurisdiction over common-law tort claims for conversion and the like. Moreover, the plaintiffs bringing these genocide-based takings claims may recover neither for killings nor even for personal injuries, but only for the loss of their property. And the district court must adjudicate these claims—and thus effectively determine the scope of a genocide—without first affording the foreign sovereign an opportunity to provide redress, whether for genocide or conversion.

Before allowing this remarkable scheme to proceed further, we should reconsider it en banc. In this case, *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), and in *Simon II*, we rejected any defense of exhaustion or comity-based abstention for claims under the Foreign Sovereign Immunities Act (FSIA). These decisions create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, disregard the views of the Executive Branch on a matter of obvious foreign-policy sensitivity, and make the FSIA more amenable to human-rights litigation against foreign sovereigns than the Alien Tort Statute (ATS) is to human-rights litigation against

private defendants abetting the sovereigns. Moreover, they clear the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories. This includes claims not only for genocide, but also for the violation of most other norms of international human-rights law. The consequences of *Simon I* and its progeny are thus dramatic, while their foundations are shaky.

I

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the FSIA itself. 28 U.S.C. § 1604. It then provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" when certain exceptions apply. *Id.* § 1605. The exception at issue here, commonly called the "expropriation exception," applies to any case

> 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.

Id. § 1605(a)(3).

In *Simon I*, this Court held that the expropriation exception covers property taken as part of a genocide. We reasoned that genocide includes deliberately inflicting on a protected group

"conditions of life calculated to bring about its physical destruction." 812 F.3d at 143 (quotation marks omitted). We held that the complaint at issue, which described the experience of Jews in Hungary between 1941 and 1944, adequately alleged "the requisite genocidal acts and intent," including a "systematic, 'wholesale plunder of Jewish property'" that "aimed to deprive Hungarian Jews of the resources needed to survive as a people." *Id.* at 143–44 (citation omitted). We recognized that the international law of expropriation applies only to takings by one sovereign of property owned by nationals of another. *Id.* at 144. But we distinguished the prohibition against genocide, which encompasses acts committed by a sovereign "against its own nationals." *Id*. at 145. We also acknowledged that, for genocide-based expropriation claims, the jurisdictional and merits inquiries diverge: Genocide must be established to create subject-matter jurisdiction, but the merits involve "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* at 141. As to damages, we noted that another FSIA exception covers claims "for personal injury or death," but only for losses "occurring in the United States." 28 U.S.C. § 1605(a)(5). So, we construed the expropriation exception to permit plaintiffs claiming genocide to "seek compensation for taken property but not for taken lives." 812 F.3d at 146 (quotation marks omitted).

In *Philipp* and *Simon II*, this Court rejected exhaustion, abstention, and *forum non conveniens* defenses to the genocide-based expropriation claims recognized in *Simon I*. In *Philipp*, the panel held that the FSIA, by comprehensively codifying rules for foreign sovereign immunity, foreclosed any requirement that plaintiffs exhaust remedies available in the courts of the defendant sovereign. 894 F.3d at 414–16. *Simon II* reaffirmed that holding. There, we stated that, unlike other common-law defenses preserved by the FSIA, exhaustion

"lacks any pedigree in domestic or international common law." 911 F.3d at 1181. We further reasoned that, if an exhaustion requirement would preclude the plaintiffs from returning to federal court (as would a comity-based abstention requirement), that would only make exhaustion more like immunity. *Id.* at 1180. Then, we held that the district court abused its discretion in dismissing the claims on *forum non conveniens* grounds, even though they involved acts perpetrated by the Hungarian government against Hungarian nationals in Hungary. *Id.* at 1181–90.

II

A

The expropriation exception applies to claims for "property taken in violation of international law." 28 U.S.C. § 1605(a)(3). *Simon I* held that this provision encompasses property taken in violation of the international-law prohibition against genocide. In my judgment, it encompasses only property taken in violation of international takings law. The literal language could bear either meaning, but statutes must be construed in context. *See*, *e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Here, several contextual considerations support the narrower reading.

To begin, genocide is not about the taking of property. Rather, it involves the attempted extermination of a national, ethnic, racial, or religious group. A United Nations convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm

> to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. *Simon I* reasoned that takings may have a genocidal intent, and thus meet the last prong of this definition. 812 F.3d at 143–44. But they still must be intended to cause the "physical destruction" of a group—what matters is the attempted mass murder. And if genocide involves attempted mass murder, a provision keyed to "property taken" would be a remarkably elliptical way of addressing it. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

It would be even stranger for Congress to address genocide as exclusively a property offense. The FSIA's expropriation exception encompasses only claims for "property," 28 U.S.C. § 1605(a)(3), whereas its separate tort exception, which encompasses claims "for personal injury or death," covers only harms "occurring in the United States," *id.* § 1605(a)(5). So, *Simon I* approved an exceedingly odd type of genocide claim—one for property harms but *not* for personal injury or death. Moreover, the expropriation exception requires a connection between the property taken and commercial activity in the United States: the property or its proceeds must either be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or "owned or operated by an agency or instrumentality of the foreign state" that is itself "engaged in a commercial activity in the United States." *Id.* § 1605(a)(3). These requirements would make little sense in a provision addressed to human-rights abuses such as genocide, rather than to purely economic wrongdoing.

As strange is the mismatch between jurisdiction and merits. *Simon I* requires proof of genocide to abrogate sovereign immunity—which must be determined at the outset. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318–24 (2017). But abrogating immunity does not create a private right of action, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004), and there is no common-law right of action for genocide. Instead, the merits here involve "'garden-variety common-law' claims," such as "replevin, conversion, unjust enrichment, and bailment." *Philipp*, 894 F.3d at 410–11 (citation omitted); *see also Simon I*, 812 F.3d at 141. This scheme oddly matches the jurisdictional equivalent of a thermonuclear weapon (determining the scope of a genocide) to the merits equivalent of swatting a fly (determining whether there was a common-law conversion). And it is in marked contrast to the FSIA's terrorism exception, which applies to claims for various specified acts, 28 U.S.C. § 1605A(a)(1), and which creates a cause of action for those acts, *id.* § 1605A(c).

Broader statutory context creates further difficulties. The FSIA's other primary exceptions are narrow ones covering waiver, commercial activity in the United States, rights to property in the United States, torts causing injury in the United States, and arbitration. 28 U.S.C. § 1605(a)(1)–(6). The Supreme Court has described these exceptions as collectively codifying the pre-FSIA "restrictive" theory of foreign sovereign immunity, which covers a sovereign's "public acts" but not its commercial ones. *See Helmerich & Payne*, 137 S. Ct. at 1320–21; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–89 (1983). In a case specifically involving the expropriation exception, the Court "found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles." *Helmerich & Payne*, 137 S. Ct. at 1320. Abrogating immunity for public acts

committed by a foreign sovereign against its own nationals within its own territory would be just such a radical departure.

The international law of foreign sovereign immunity cuts in the same direction. Here is its "Basic Rule": "Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons." Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) (Third Restatement). Like the FSIA, international law provides narrow exceptions to immunity for claims arising out of commercial activity, *id.* § 453(1); torts causing injuries within the forum state, *id.* § 454(1); property claims involving commercial activities, gifts, or immovable property in the forum state, *id.* § 455(1); and waiver, *id*. § 456(1). None of these exceptions covers the genocide-based takings claims recognized in *Simon I*. So, *Simon I* construes the FSIA to conflict with international law—which is to be avoided if possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Of course, none of this suggests that genocide or other violations of international human-rights law should go unremedied; but such violations typically are addressed either through diplomacy or in international tribunals, rather than in the domestic tribunals of another sovereign. *See* Third Restatement § 906 & cmt. *b*.

Consistent with these principles, the courts have rejected attempts to shoehorn modern human-rights law into the FSIA exceptions. For example, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Supreme Court held that the commercial-activity exception did not cover claims that Saudi Arabia illegally detained and tortured a United States citizen employed by a Saudi government hospital. The Court construed the exception to track the restrictive theory of sovereign immunity:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

Id. at 361. In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), we likewise construed the FSIA's waiver exception, which includes waivers "by implication," 28 U.S.C. § 1605(a)(1), to track the restrictive theory. We held that Germany did not impliedly waive its foreign sovereign immunity by using slave labor during the Nazi era. 26 F.3d at 1173. And we did so despite recognizing that slavery—like genocide—violates a *jus cogens* norm of international human-rights law, *i.e.*, "a norm from which no derogation is permitted." *Id.* (quotation marks omitted).

The only deviation from this pattern is the FSIA's terrorism exception, which covers a significant class of cases involving the public acts of a foreign sovereign. But the differences between the terrorism and expropriation exceptions are striking: The terrorism exception meticulously describes and limits the possible plaintiffs (United States nationals, members of the United States armed forces, and United States employees or contractors), 28 U.S.C. § 1605A(a)(2)(A)(ii); the possible defendants (generally, foreign states formally designated as sponsors of terrorism), *id.* § 1605A(a)(2)(A)(i); the acts triggering the exception ("torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act"), *id.* § 1605A(a)(1); the

associated private cause of action (covering the same parties and acts), *id.* § 1605A(c); and the damages available (for personal injury, death, or foreseeable property loss), *id.* § 1605A(a)(1), (d). This carefully reticulated framework is far different from a provision keyed only to "property taken in violation of international law." *Id.* § 1605(a)(3).

B

The grave consequences of *Simon I* bear not only on its correctness, but also on the appropriateness of en banc review.

Most obviously, *Simon I* requires federal courts to determine the scope of genocide committed by various foreign countries during World War II. We suggested that this determination may sometimes be straightforward—as in the case of Hungarian Jews in the early 1940s. *See* 812 F.3d at 142–44. Even so, each individual plaintiff must prove not only that there was a genocide, but also that he or she (or a decedent) was subjected to a genocidal taking. Sometimes, this will be far from clear. For example, the *Philipp* panel concluded that a coerced sale of art in 1935, for "barely 35% of its actual value," could be an act of genocide. 894 F.3d at 409, 413–14 (quotation marks omitted). Germany objected that the plaintiffs' theory would transform into genocide any "'transaction from 1933–45 between' a Nazi-allied government and 'an individual from a group that suffered Nazi persecution.'" *Id.* at 414. The panel envisioned something only slightly less concerning—case-by-case adjudications of which commercial transactions were sufficiently coercive, unfair, and improperly motivated to be genocide. *Id.* Such claims could be made against a number of European nations. *See*, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir.

2005); *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008). And they would create massive exposure. For example, in a case that, like *Simon*, involved Jews who lost property in the Hungarian Holocaust, the damages sought were some $75 billion—"nearly 40 percent of Hungary's annual gross domestic product in 2011." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012).

Moreover, the reasoning of *Simon I* cannot be limited to genocide. International law sharply distinguishes between the law of expropriation, which restricts only the takings by one sovereign of property belonging to the nationals of another, *see* Third Restatement § 712, and human-rights law, which now governs one sovereign's treatment of its own nationals within its own borders, *id.* § 701. Under the latter,

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Id. § 702. The first six of these seven categories are *jus cogens* norms—the most serious ones, which are binding even in the face of an international agreement to the contrary. *Id.* cmt. *n*. Most of them—including not only genocide, but also slavery, murder, degrading treatment, and systemic racial discrimination—can involve harms to property. Under the reasoning of *Simon I*, all of these could be the subject of litigation through the expropriation exception.

To appreciate the gravity of this, consider if the shoe were on the other foot. Imagine the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination. Yet that is a precise mirror image of *Simon*. Given the stakes, what we once said about the waiver exception rings true here:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Princz, 26 F.3d at 1175 n.1.

III

Philipp and *Simon II* magnify the concerns about *Simon I* and come with their own analytical difficulties.

A

On the merits, *Philipp* and *Simon II* held that the FSIA forecloses any exhaustion or comity-based abstention defense. 894 F.3d at 414–16; 911 F.3d at 1180–81. But far from

foreclosing these defenses, the FSIA affirmatively accommodates them. It provides that, for any claim falling within an immunity exception, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. A "private individual" under "like circumstances" would be one facing claims for aiding and abetting violations of international human-rights law. Such claims would be brought under the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Another like circumstance might involve private individuals sued for wrongful death, battery, or conversion. In either instance, exhaustion and abstention defenses would likely be available.

The Supreme Court has at least hinted that an ATS plaintiff must exhaust local remedies before litigating an international-law tort claim in federal district court. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court explained:

> the European Commission argues … that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

Id. at 733 n.21 (citations omitted). Four justices have embraced exhaustion more definitively—without provoking any disagreement. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430–31 (2018) (Sotomayor, J., dissenting); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013) (Breyer, J.,

concurring in the judgment). The Ninth Circuit has held that exhaustion is required in ATS cases if local remedies are adequate. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion); *id.* at 833–37 (Bea, J., concurring); *id.* at 840–41 (Kleinfeld, J., concurring).

Private defendants also may seek comity-based abstention. For example, *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014), involved ATS and state-law claims against defendants alleged to have abetted the bombing of a Colombian village by the Colombian government. *See id.* at 584. After dismissing the ATS claims as impermissibly extraterritorial, the Ninth Circuit dismissed the state-law claims "based on the doctrine of international comity." *Id.* at 596–97. As the court explained, "[i]nternational comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Id.* at 598 (citation omitted). Likewise, in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), the Eleventh Circuit dismissed on comity-based abstention grounds a claim by an American citizen that two German banks, during the 1930s and early 1940s, had stolen her family property "through the Nazi Regime's program of 'Aryanization.'" *Id.* at 1229, 1237–40. Comity interests are heightened where, as here, the claims "arise from events of historical and political significance" to the foreign sovereign. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). Like exhaustion, comity-based abstention presupposes an adequate forum in the offending country. *See*, *e.g.*, *Mujica*, 771 F.3d at 603–04. But *Philipp* and *Simon II* rejected exhaustion and abstention defenses as categorically unavailable in FSIA cases, not on the narrower ground that fora in Germany and Hungary were inadequate.

The *Philipp* panel reasoned that because the FSIA comprehensively sets forth immunity defenses, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141–42 (2014), but does not expressly provide for exhaustion or abstention defenses, it must implicitly have foreclosed those defenses. 894 F.3d at 415–16. But foreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention. As shown above, these defenses are available to private defendants no less than to foreign sovereigns. In that critical respect, the defenses are less akin to immunity than to generally applicable, judge-made defenses such as *forum non conveniens*, the act-of-state doctrine, and the political-question doctrine—none of which is mentioned in the text of the FSIA, but all of which survived its enactment. *See*, *e.g.*, *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005). Exhaustion and abstention are also different from arbitration. So, the inclusion of an arbitration requirement in the terrorism exception, 28 U.S.C. § 1605A(a)(2)(A)(iii); *see Philipp*, 894 F.3d at 415, says nothing about exhaustion or abstention.

Simon II further reasoned that exhaustion "lacks any pedigree in domestic or international common law." 911 F.3d at 1181. But international law requires an individual "claiming to be a victim of a human rights violation" to "exhaust[ ] available remedies under the domestic law of the accused state" before another state may espouse his claim. *See* Third Restatement § 703 cmt. *d*. Likewise, individual victims generally have international remedies only as provided by agreement, *see id.* cmt. *c*, and international agreements "also generally require that the individual first exhaust domestic remedies," *id.* cmt. *d*. To be sure, the Third Restatement does not expressly apply the same rule to instances where the victim seeks redress in the courts of a foreign sovereign. *See Philipp*,

894 F.3d at 416. But the drafters would have had no occasion to address exhaustion in that specific circumstance, given the overwhelming likelihood that, under international standards, sovereign immunity would have barred the claims. *See* Third Restatement §§ 451–56. Moreover, the logic for requiring exhaustion is even stronger in the context of actions filed in domestic courts; "if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction." *Sarei*, 550 F.3d at 830 (plurality opinion). As for domestic exhaustion rules, federal courts have crafted them for over a century, out of respect for other sovereigns such as states or Indian tribes. *See*, *e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Finally, *Simon II* reasoned that exhaustion might, by operation of *res judicata*, bar plaintiffs from ever bringing claims in the United States. 911 F.3d at 1180. That is not necessarily true, at least if the plaintiff reserves the right to litigate international claims in the United States after pursuing domestic tort claims elsewhere. *Cf. England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 413–19 (1964). In any event, there is nothing anomalous with exhaustion triggering preclusion. *See*, *e.g.*, *Iowa Mut.*, 480 U.S. at 19. Moreover, the same objection would apply to exhaustion under the ATS, yet the Ninth Circuit still adopted it. Comity-based abstention does prevent a plaintiff from litigating in a United States forum, yet the courts have applied it to cases involving private defendants facing foreign-centered human-rights claims. The FSIA makes the same defenses also available to foreign sovereigns.

B

Philipp and *Simon II* warrant rehearing en banc for several reasons. *First*, they create a circuit split on a sensitive foreign-policy question. The Seventh Circuit has required Hungarian Holocaust survivors to exhaust remedies in Hungary before seeking to litigate under the FSIA's expropriation exception. *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 856–66 (7th Cir. 2015); *Abelesz*, 692 F.3d at 678–85. After describing the nearly existential threat of a $75 billion lawsuit, the Seventh Circuit held that "Hungary, a modern republic and member of the European Union, deserves a chance to address these claims." *Abelesz*, 692 F.3d at 682. The *Philipp* panel acknowledged creating a circuit split. 894 F.3d at 416.

Second, *Philipp* rejected the position advanced by the United States. *See* 894 F.3d at 416. In *Simon II*, the United States argued at length that "[d]ismissal on international comity grounds" was consistent with the FSIA and "can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States." Br. for Amicus Curiae United States at 14–15, *Simon v. Republic of Hungary* (No. 17-7146); *see also id.* at 14–24. The United States again took the same position in supporting rehearing en banc in *Philipp*. Br. for United States as Amicus Curiae in Support of Rehearing En Banc at 3–14. Given the Executive Branch's "vast share of responsibility for the conduct of our foreign relations," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quotation marks omitted), we should consider its views on this issue with special care.

Third, by eliminating various defenses, these decisions heighten concern about *Simon I*. Two important defenses—exhaustion and abstention—are now foreclosed. And if it was an abuse of discretion to dismiss on *forum non conveniens*

grounds the foreign-cubed claims in *Simon II*, *see* 911 F.3d at 1182, then few of these human-rights cases will qualify for that defense. Other possible doctrines for limiting the expropriation exception, *see Altmann*, 541 U.S. at 713 (Breyer, J., concurring), are also unlikely to have much effect: Personal jurisdiction requirements do not apply to foreign sovereigns. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Venue is always proper in the District of Columbia for actions "brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4). The act-of-state doctrine may not apply to Nazi-era claims, *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972) (plurality opinion); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (per curiam), and generally does not apply to expropriation claims arising after January 1, 1959, *see* 22 U.S.C. § 2370(e)(2). Statutes of limitation may bar some claims arising from World War II, despite inevitable tolling or concealment arguments, but they will have no effect on claims arising from recent alleged human-rights abuses. Finally, *Simon I* itself held that the political-question doctrine does not bar the claims that it approved. *See* 812 F.3d at 149–51.

Fourth, these decisions make the FSIA more receptive to human-rights litigation than is the ATS. Under *Simon I*'s broad interpretation of the expropriation exception, most modern ATS claims could be recast as FSIA ones. And after *Philipp*, recasting has significant advantages. For example, ATS claims that a defendant had abetted crimes against humanity by Papua New Guinea must be exhausted. *See Sarei*, 550 F.3d at 824 (plurality opinion). Yet under *Philipp*, the same lawsuit would face no exhaustion requirement if filed directly against Papua New Guinea. ATS claims of abetting atrocities committed by a foreign sovereign within its own territory are impermissibly extraterritorial. *See Kiobel*, 569 U.S. at 111–12, 124–25. Yet

under *Philipp*, the same lawsuits, if filed directly against the foreign sovereigns, might survive on the theory that common-law tort claims have no territorial limit. *Compare Mujica*, 771 F.3d at 591–96 (dismissing ATS claims as extraterritorial), *with id.* at 596–615 (dismissing state-law claims only on comity grounds). Such results are perverse, for FSIA actions against foreign sovereigns raise even greater foreign-policy concerns than do ATS actions against private parties who may abet them.

Finally, the mismatch noted above between jurisdictional and merits issues under *Simon I* makes exhaustion even more important. If the federal courts must resolve the scope of a genocide in order to decide garden-variety conversion claims, then so much the better if the foreign sovereign can perhaps resolve the claims by addressing only the merits.

* * * *

For these reasons, I would grant rehearing en banc to reconsider the approach to the FSIA's expropriation exception set forth in *Simon I*, *Philipp*, and *Simon II*.

Appendix C

[ARGUED MAY 2, 2018; DECIDED JULY 10, 2018]

No. 17-7064, consolidated with No. 17-7117

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN PHILIPP, ET AL.,

Plaintiffs-Appellees,

v.

FEDERAL REPUBLIC OF GERMANY, a foreign state; and STIFTUNG PREUSSISCHER KULTURBESITZ,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

JENNIFER G. NEWSTEAD
Legal Adviser

U.S. Department of State
Washington, D.C. 20520

JOSEPH H. HUNT
Assistant Attorney General

SHARON SWINGLE
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7270
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
202.514.1923

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellees are Alan Philipp, Gerald G. Stiebel, Jed R. Leiber. The defendants-appellants are the Federal Republic of Germany and Stiftung Preußischer Kulturbesitz. Amicus curiae are David Toren and the United States of America.

B. Rulings Under Review

The ruling under review is the district court's March 31, 2017 order denying a motion to dismiss the action, for the reasons set forth in the accompanying memorandum opinion. The decision is published at 248 F. Supp. 3d 59 (D.D.C. 2017), and is reprinted at Joint Appendix 310-51.

C. Related Cases

On April 21, 2017, defendants filed a notice of appeal regarding the district court's decision, which was assigned case number 17-7064. At the same time, defendants moved the district court to certify the entirety of its decision for interlocutory appeal under 28 U.S.C.

§ 1292(b). The district court granted defendants' motion on May 18, 2017, and so certified its opinion. *See Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84 (D.D.C. 2017). On May 30, defendants filed a petition with this Court asking the Court to accept an interlocutory appeal of the entirety of the district court's decision. That petition was assigned case number 17-8002. On August 1, this Court granted Defendants' petition. The district court then filed this Court's order as a separate notice of appeal, which was assigned case number 17-7117. On August 4, this Court consolidated cases 17-7064 and 17-7117.

There appear to be no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). However, there have been a number of other cases that raised similar legal issues, including *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), and *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42 (D.D.C. 2017), *appeal docketed*, No. 17-7146 (D.C. Cir. Oct. 23, 2017).

/s/ Casen B. Ross
CASEN B. ROSS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(b)(2), the United States submits this brief as amicus curiae in support of rehearing en banc.

The United States deplores the wrongdoings committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. Since the end of World War II, the United States has worked in numerous ways to achieve some measure of justice. With the United States' encouragement, the German government has provided roughly $100 billion (in today's dollars) to compensate Holocaust survivors and other victims of the Nazi era.

The United States has not been involved in efforts to resolve plaintiffs' specific property claims, but it hosted the conference that produced the Washington Conference Principles on Nazi-Confiscated Art, *see* U.S. Dep't of State, https://go.usa.gov/xPYUU (last visited Sept. 15, 2018), in accordance with which Germany established an Advisory Commission to resolve disputes regarding cultural assets seized by the Nazi regime.

The United States takes no position on whether the Advisory Commission correctly decided not to recommend the return of the property at issue here, or whether the district court correctly denied the defendants' motion to dismiss. The United States files this brief as amicus curiae, however, to express its view that a district court may, in an appropriate case, abstain on international comity grounds from exercising jurisdiction over claims brought under the expropriation exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1605(a)(3). Comity-based abstention may be appropriate where litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.[1]

The panel erred in holding that the FSIA "leaves no room" for a court to abstain from exercising jurisdiction as a matter of international comity. Slip Op. 17. The FSIA comprehensively addresses foreign sovereign immunity, but does not displace other areas of law, including comity-based abstention. The panel relied on *Republic of Argentina v.*

[1] The defendants' rehearing petition (at 11-19) also asks the Court to review its decision in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). The United States takes no position on whether the court should grant rehearing on this issue.

NML Capital, Ltd., 134 S. Ct. 2250 (2014), but there, the foreign state claimed immunity under the FSIA, and the Court expressly noted that a court "may appropriately consider comity interests" in resolving non-immunity issues relating to post-judgment discovery. *Id.* at 2258 n.6. These interests may similarly be considered by a court when it is asked to abstain on comity grounds. The provisions of the FSIA that the panel relied on do not suggest Congress intended to bar considerations of comity, a common-law doctrine that courts have applied for centuries.

ARGUMENT

THE FSIA DOES NOT PROHIBIT A DISTRICT COURT FROM ABSTAINING AS A MATTER OF INTERNATIONAL COMITY FROM EXERCISING JURISDICTION OVER A CLAIM BROUGHT UNDER THE FSIA'S EXPROPRIATION EXCEPTION.

A. United States courts have long recognized the doctrine of international comity, which permits courts to recognize the "legislative, executive or judicial acts of another nation" giving "due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *see also id.* at 164-65 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834) (describing international comity as a doctrine of "beneficence,

humanity, and charity," which "arise[s] from mutual interest and utility")); *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370, n.* (1798) (referring to the doctrine of comity of nations).

International comity discourages a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute (or provision for its resolution), or otherwise sitting in judgment of a foreign government's official acts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."). One strand of comity is "adjudicatory comity," pursuant to which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). This doctrine is one of "prudential abstention," applied "when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Id.* at 598 (quotations omitted).

In enacting the FSIA, Congress established a comprehensive legal framework governing the immunity of foreign states from the jurisdiction of U.S. courts. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). But the Act was not meant to affect substantive liability or other areas of law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) ("[T]he FSIA * * * grant[ed] jurisdiction yet le[ft] the underlying substantive law unchanged." (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983)).

Along these lines, "the doctrine of *forum non conveniens* remains fully applicable in FSIA cases." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002). And this Court has recognized that other common-law principles continue to apply in cases against foreign states following the FSIA's enactment. *See, e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) (*forum non conveniens* and act-of-state doctrine); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (political question doctrine).

This Court has also observed that litigation under the FSIA may involve sensitive questions of foreign affairs that "obviously occasion a continuing involvement by the Executive * * * in matters relating to the application of the act of state doctrine and giving appropriate weight to those views." *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citations omitted).

Abstention on the basis of international comity, like *forum non conveniens*, is not a jurisdictional doctrine but instead a federal common-law doctrine of abstention in deference to an alternative forum. *See In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) ("Forum non conveniens does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction."). And like the act-of-state doctrine, adjudicatory comity is grounded in concerns that a court's adjudication of a claim may improperly impinge on the sovereignty of a foreign nation. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-39 (1964) (distinguishing between court's jurisdiction over claim against foreign state for expropriation, and the court's application of the act-of-state doctrine to decline to examine the merits). Nothing in the text or history of the FSIA suggests that it was

intended to foreclose application of those longstanding common-law doctrines.

Significantly, abstention on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing that a federal court may decline to exercise jurisdiction in deference to predominant State interests under various abstention doctrines, including *Pullman* and *Younger* abstention); *see also id.* at 723 (noting that comity-based abstention stems from a similar premise as *forum non conveniens*). Just as the "longstanding application of [federalism-based abstention] doctrines reflects the common-law background against which the statutes conferring jurisdiction were enacted," *Id.* at 717—that Congress should not be presumed to have intended to override absent clear evidence to the contrary, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)—a court should not presume from statutory silence that the FSIA's immunity provisions were intended to abrogate comity-based abstention. The panel offered no explanation why federal courts should be able to abstain from

exercising jurisdiction in deference to a State's interests, but not in deference to the interests of a foreign sovereign.

Notably, the Supreme Court has explicitly left open the possibility that the United States could suggest that "courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity," *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)—abstention based on international comity could be such a basis. *See id.* at 702 (explaining that the Court would give deference to the Executive Branch's foreign policy views in deciding whether to exercise jurisdiction under the FSIA).

Jurisdiction under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), is unusual in that it typically involves claims alleging international-law violations committed in a foreign state, rather than purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, in which the relevant action (or at least the gravamen of the claim) took place in the United States. This exception thus contemplates particular solicitude for international comity and consideration for whether a plaintiff had exhausted remedies in the country where the alleged expropriation took place. At

the very least, the text and history of the FSIA afford no reason to foreclose a court from abstaining as a matter of comity.

B. The Supreme Court's decision in *NML Capital*, 134 S. Ct. 2250, does not preclude a court from abstaining based on adjudicatory comity in a case in which the court has jurisdiction under the FSIA. In *NML Capital*, the Court addressed "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state." 134 S. Ct. at 2255. The Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text," and that the FSIA does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* at 2256. The Court noted the concerns raised by Argentina and the United States in arguing for a contrary statutory interpretation regarding the potential affront to foreign states' sovereignty and to international comity resulting from sweeping discovery orders, but held that only Congress could amend the statute to address those concerns. *Id.* at 2258.

The panel relied on *NML Capital* to conclude that, if a court has jurisdiction under the FSIA, it may not abstain from exercising that jurisdiction on comity grounds. Slip Op. 16-17. To be sure, *NML Capital* held that a foreign state's immunity is governed by the FSIA. But the Supreme Court also expressly recognized that, even where a court has jurisdiction under the FSIA, comity might be relevant to other non-immunity determinations in the litigation. *NML Capital*, 134 S. Ct. at 2258 n.6 ("[W]e have no reason to doubt that [a court] may appropriately consider comity interests" in determining the appropriate scope of discovery.).

A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune. *See, e.g.*, *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (explaining that comity is not "a special immunity defense found in the FSIA"); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) (distinguishing between foreign state's claim to sovereign immunity under the FSIA and its "unique interest in resolving the ownership of or claims to" assets wrongfully taken). The panel thus

erred by reading *NML Capital* to resolve an issue not addressed in that case to foreclose application of a long-recognized abstention doctrine.

C. The panel also relied on two provisions of the FSIA in holding that the statute precludes abstention on comity grounds. Neither supports the panel's conclusion.

First, the panel pointed to the FSIA's terrorism exception, which requires a plaintiff in some circumstances to "afford[] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit. 28 U.S.C. § 1605A(a)(2)(A)(iii). The panel reasoned by negative implication that, because a district court *must* dismiss such a claim brought under the FSIA's terrorism exception if the claim is not appropriately exhausted, a district court *cannot* dismiss a claim for failure to exhaust in a foreign forum. Slip Op. 15.

There is no evidence, however, that in enacting the terrorism exception some twenty years after the FSIA was originally enacted, Congress intended to foreclose the possibility that a court might abstain from exercising jurisdiction under other exceptions based on common-law abstention. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. The Act's

expropriation exception does not require exhaustion, but neither does it forbid a court from abstaining in deference to an alternative forum. The panel's reasoning would also appear to foreclose dismissal on *forum non conveniens* grounds, despite binding circuit precedent to the contrary. *Price*, 294 F.3d at 100.

Furthermore, abstention on comity grounds is not, as the panel seemed to understand it, an exhaustion requirement. Rather, it reflects the principle that, in an appropriate case, a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign's interests. That may mean deferring to an alternative forum, *e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); deferring to a foreign law that strips plaintiffs of standing to bring suit, *e.g.*, *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); or giving conclusive weight to the foreign state's resolution of a dispute, *e.g.*, *Mujica*, 771 F.3d at 614-15. The FSIA requirement to arbitrate terrorism claims before bringing suit does not suggest that Congress intended to prohibit a court from

deferring to the foreign state's interests in a claim brought under a different provision of the Act.

The panel also erred in claiming support for its position from 28 U.S.C. § 1606, which provides that, "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under [28 U.S.C. §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," with the exception of punitive damages. Slip Op. 15-16. The panel appeared to believe that provision requires a court to treat foreign states the same as private defendants. Slip Op. 16 ("[Section 1606] permits only defenses * * * that are equally available to private individuals").

Even under the panel's reasoning, its conclusion was erroneous. Just as private individuals may invoke *forum non conveniens* as a basis for a court to abstain from exercising jurisdiction, *see* Slip Op. 16, private parties may similarly seek abstention on the basis of adjudicatory comity. *See, e.g.*, *Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1238. In asserting that a private individual cannot invoke a

sovereign's right to resolve disputes against it, the panel construed comity far more narrowly than the doctrine has been applied.

The panel erred in ruling that a court may not abstain, on international comity grounds, from adjudicating a claim over which the court has jurisdiction under the FSIA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

JENNIFER G. NEWSTEAD
Legal Adviser

U.S. Department of State
Washington, D.C. 20520

JOSEPH H. HUNT
Assistant Attorney General

SHARON SWINGLE

/s/ Casen B. Ross
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7270
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
202.514.7270
casen.ross@usdoj.gov

September 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(4) and 29(b)(4) because it contains 2,537 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Casen B. Ross
CASEN B. ROSS

Appendix D

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7250
MBS:SSwingle Washington, D.C. 20530

Tel: (202) 353-2689
Fax: (202) 514-8151

September 9, 2004

Via Federal Express
Roseann B. MacKechnie, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Garb v. Republic of Poland*, No. 02-7844 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the Court's July 27, 2004, Order directing the submission of briefs on the question "[w]hether, and if so how, the United States Supreme Court's decision in *Republic of Austria v. Altmann*, 541 U.S. ___ (June 7, 2004) is relevant to the issue of subject matter jurisdiction in this case." *Altmann* makes clear that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA), should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. As we demonstrate, under the FSIA's takings exception, § 1605(a)(3), jurisdiction is limited to expropriations of aliens' property, such as those claims that were the subject of the 1960 Agreement between the United States and Poland, and does not encompass the broader range of property deprivations in violation of international human rights law. That exception also permits jurisdiction over a foreign state only where its own contacts with the United States satisfy the first prong of the exception, *i.e.*, the state holds seized property in the

United States in connection with its own commercial activity here. A court may not base jurisdiction over the state itself on the less extensive contacts of a juridically distinct instrumentality, on the basis that those contacts would allow jurisdiction over the instrumentality under the terms of the exception's second prong.

I. Background

The plaintiffs are former Polish citizens or their heirs, who allege that Poland engaged in a pogrom against surviving Jewish citizens following World War II, confiscating Jewish citizens' property, encouraging violence against Jewish citizens, and otherwise discriminating against Poland's remaining Jews in an effort to drive them into exile. Although the FSIA imposes a general rule of immunity for claims against foreign sovereigns and their instrumentalities, 28 U.S.C. § 1604, it creates exceptions to immunity where, *inter alia*, the action is based on a foreign state's commercial activity in or directly affecting the United States; or the action involves property rights "taken in violation of international law" and the property is in the United States in connection with a foreign state's commercial activity or is owned or operated by a foreign instrumentality engaged in commercial activity in the United States. *Id.* § 1605(a)(1)-(3).

The district court held that the FSIA's takings exception could not be applied to pre-FSIA conduct. *Garb v. Republic of Poland*, 207 F. Supp.2d 16, 28-30 (E.D. N.Y. 2004). The court also held that the commercial activity exception, although potentially available, was not satisfied because plaintiffs' claims were based on the "quintessentially sovereign act" of Poland's expropriation of its citizens' property, which also lacked any direct effect on the United States. *Id.* at 31-33. Finally, the court suggested that the takings exception would not be satisfied even if it were available, reasoning that numerous courts have held that international law is not violated

by a sovereign's expropriation of its own nationals' property, and further that the Ministry of Treasury appears to be part of the Polish state rather than an agency or instrumentality. *Id.* at 34-38.

This Court vacated and remanded for further proceedings. *Garb v. Republic of Poland*, No. 02-7844, 2003 WL 21890843, at *2 (Aug. 6, 2003). The Court held that jurisdiction turned on "whether the plaintiffs * * * could have legitimately expected to have their claims adjudicated in the United States" prior to enactment of the FSIA, and ordered the district court to determine the State Department's pre-FSIA policy with respect to sovereign immunity for claims against Poland arising out of post-War conduct. *Id.* at 2-*3 & n.1.

The Supreme Court granted defendants' petition for certiorari, and vacated and remanded for further consideration in light of *Altmann*. 124 S. Ct. 2835 (2004). *Altmann*, which was decided after this Court's decision, involved claims against Austria arising out of World War II-era conduct. *See id*. at 2243-2246. The claimed basis for jurisdiction was the FSIA's takings exception, although no such exception to the rule of foreign state immunity had existed at the time of the alleged wrongdoing. *See id.* at 2245-2247. The Supreme Court held that courts should apply the FSIA's principles of foreign state immunity to conduct pre-dating the statute's enactment. *Id.* at 2252-2255.

II. Discussion

Altmann holds that the FSIA should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. The FSIA grants sovereign immunity to a foreign state sued in a United States court unless the claim against it falls within the exceptions defined by statute. *See* 28 U.S.C. § 1604-1605. In our prior brief to this Court, the United States

explained that the commercial activity exception to the FSIA does not provide a basis for subject matter jurisdiction over plaintiffs' claims against Poland because the "expropriation of property by a foreign government by sovereign act is not the type of 'commercial activity' that Congress intended to fall within that exception to the FSIA." U.S. Am. Br. 13-14. *Altmann* did not alter that analysis.

However, we have not previously addressed the scope of the takings exception, which *Altmann* holds applies to all claims brought after the FSIA's enactment. That exception denies sovereign immunity in cases "in which rights in property taken in violation of international law are at issue and [i] 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 [ii] 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). As we explain below, plaintiffs' claims do not involve "rights in property taken in violation of international law" within the meaning of the statute. Nor, where the stringent nexus requirements of the exception's first prong are not satisfied, does the provision strip a state of its immunity based solely on the lesser class of contacts of an instrumentality that would confer jurisdiction over that instrumentality under the second prong of the exception.

1. *Section 1605(a)(3) applies only to takings in violation of the international law of state responsibility and expropriation.* The FSIA's takings exception was intended to deny immunity for violations of the international law of state responsibility and expropriation, which governs a state's seizure of property belonging to nationals of another state. Absent a clear directive from

Congress, the exception should not be interpreted to substantially expand the universe of legal principles relating to property rights that can serve as a basis for U.S. courts' jurisdiction, to include the full range of international human rights law affecting nationals as well as aliens.

The legislative history of the FSIA explains that the takings exception was intended to govern "Expropriation claims," encompassing "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature." *Foreign Sovereign Immunities Act of 1976,* H.R. Rep. No. 94-1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. This characterization of the exception's scope parallels the Restatement's description of the international law principles of state responsibility, which bar a state's discriminatory expropriation of the property of aliens and its expropriation of foreign nationals' property without the payment of adequate, reasonably prompt, and effective compensation. *See* Restatement (2d) of Foreign Relations Law §§ 165-166, 185-187 (1965); *see also* Restatement (3d) of Foreign Relations Law § 712 (1986) ("A state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state that * * * (b) is discriminatory, or (c) is not accompanied by provision for just compensation."). As the Restatement makes clear, international law of state responsibility does not regulate a state's treatment of its own nationals, but rather is limited to certain "taking[s] by the state of the property of a *national of another state*." Restatement (3d) § 712(1) (emphasis added). There is no evidence that Congress intended to confer jurisdiction over the entire range of potential deprivations of property in violation of international human rights principles.

Consistent with this, the takings exception has been interpreted by every court to have

considered the question not to apply to the expropriation by a country of the property of its own nationals. *E.g.*, *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-712 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985); *see also Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) (noting lower courts' "consensus view * * * that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals").[1] Notably, Congress has never overridden that uniform interpretation.

In their prior briefs, plaintiffs relied on the legislative history reference to "discriminatory" takings as evidence that the takings exception was intended to encompass a sovereign's racial or religious discrimination against its own nationals. *E.g.*, Appellants' Br. at 54. When viewed in context, however, the reference in the legislative history is to discrimination against aliens — *i.e.*, the very subject on which the law of state responsibility and expropriation is focused. See Restatement (2d) § 166. Indeed, many of the sources cited by plaintiffs as evidence of the customary international law norm against "discriminatory" expropriations address the taking of non-nationals' property, and thus lend support to a more limited interpretation of the takings exception. *See, e.g.*, Appellants' Reply at 14 ("to comply with

---

[1] A number of courts have based their holdings on a conclusion that a foreign state's seizure of the property of its own national does not, even if motivated by religious or racial discrimination, violate international law. *Cf. Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (holding, under Alien Tort Statute, that Nazi Germany's discriminatory seizure of Jewish citizen's property did not violate international law). As we explain in the text, the proper question before the court is *not* whether the discriminatory taking of Jewish property violated international human rights norms, but whether that conduct is within the class of cases against foreign states that Congress intended U.S. courts to hear under the takings exception. It is not.

international law, nationalization 'must not discriminate against *aliens* or any particular kind of *alien*'" (emphasis added)); *ibid.* ("the minimum standard of justice * * * means the right of *foreign nationals* to receive full compensation" (emphasis added)).

The interpretation of § 1605(a)(3) as limited to the international law of expropriation is further confirmed by the statutory backdrop against which it was enacted — in particular, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). That statute, originally enacted in 1964, bars a federal court from invoking the "act of state" doctrine to dismiss a suit challenging a state "taking * * * in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." The statute has consistently been interpreted to apply only in cases involving the taking of alien property, not that of a state's own national. *E.g.*, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (collecting cases). The FSIA takings exception was intended to harmonize the scope of foreign sovereign immunity with the act of state doctrine under U.S. law. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

Limiting the takings exception to a foreign government's seizure of aliens' property is also consistent with courts' general reluctance to construe the FSIA exceptions to confer jurisdiction over claims that a foreign state violated human rights, particularly where the conduct took place within the state's own borders. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-363 (1993) (commercial activity exception does not confer jurisdiction over claims involving torture by foreign government's police and penal officers); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-1176 (D.C. Cir. 1994) (waiver exception does not confer

jurisdiction over Nazi-era slave labor case); *cf. Smith v. Socialist People's Libyan Arab Hamahiriya*, 101 F.3d 239, 244-245 (2d Cir. 1996) (waiver exception does not confer jurisdiction over terrorism bombing alleged to violate *jus cogens* norms). Congress has also set careful limits on federal jurisdiction over tort claims against foreign sovereigns arising out of conduct occurring outside of the United States, providing that, as a general matter, noncommercial tort claims can be brought against foreign states only if the damage or injury occurred in this country. *See* 28 U.S.C. § 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989). Although Congress amended the FSIA in 1996 to allow for certain extraterritorial tort claims relating to terrorism, it strictly limited and defined the permissible claims and the class of potential defendants. *See id.* § 1605(a)(7). Construing § 1605(a)(3) to allow for international human rights claims would undermine these careful limitations.

Finally, courts' consensus interpretation of the takings exception as not encompassing claims against a state by its nationals is consistent with international expropriation law, which was the premise of numerous claims settlement agreements entered into by the United States over the last century, including a 1960 agreement between the United States and Poland. As we described in our supplemental amicus filing on May 2, 2003, the United States and Poland entered into that agreement to settle claims arising out of the Polish government's nationalization of property. *See* Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (July 16, 1960), U.S.T. 1953. Although the United States undertook in that agreement to settle the claims of U.S. nationals, it did not purport to settle or address claims relating to property that

was not owned at the time of the taking by a U.S. national. The limited scope of the U.S.-Poland settlement agreement reflects the circumscribed nature of international law and practice concerning state responsibility for the expropriation of aliens' property. At that time, the sole recourse for expropriation claims was espousal. It was a well-established principle of international law that states could espouse only claims relating to wrongs done to their own citizens, absent the consent of the state both of the third-party national and also the respondent state. Congress removed immunity in certain cases, but there is no indication — much less a clear one — that it intended to include nationals of the expropriating state among those whose claims could be asserted in U.S. courts.

To the extent that there is any remaining ambiguity about the scope of the takings exception, the foreign policy interests of the United States weigh against inferring the dramatic expansion of federal court jurisdiction that plaintiffs seek. As the Supreme Court recognized in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), serious "risks of adverse foreign policy consequences" are created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens." *Id.* at 2763. As the Court held, "the potential implications for the foreign relations of the United States of recognizing" causes of action for violations of customary international law should make courts reluctant to exercise jurisdiction over such claims absent a "clear mandate" from Congress to do so. *Id.* at 2763. The FSIA contains no such "clear mandate"; to the contrary, Congress enacted the FSIA with the statement that it was intended to "codify" sovereign immunity principles "presently recognized in international law." H.R. Rep. No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. This Court should reject the suggestion that Congress nonetheless intended to significantly expand

U.S. courts' jurisdiction over previously-barred claims brought by foreign citizens against their own governments.

2. *Section 1605(a)(3) provides jurisdiction over a foreign state only where its own connections with the United States satisfy the statutory criteria under the first prong of the statutory exception.* In addition to requiring a taking "in violation of international law" for jurisdiction to exist, § 1605(a)(3) requires certain minimum connections to the United States: (i) the seized property or property exchanged for it "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or (ii) the seized property or property exchanged for it "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."

The district court correctly found that there was no basis for jurisdiction under the exception. Plaintiffs do not assert that the limited circumstances for jurisdiction under the first prong are satisfied, because they have not alleged that Poland or its Ministry of the Treasury have brought expropriated property into the United States. Nor, as the court suggested, is the second prong of the statute met, because that prong grants jurisdiction only over the agency or instrumentality that has the requisite jurisdictional contacts.

We continue to adhere to the view articulated in the United States's amicus brief in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994), and accepted by the district court in this case, that the test for determining the status of a foreign governmental entity as an agency or instead as the state itself should "look to the 'core function'" of the entity, and whether it "is the type of entity that is an integral part of a foreign state's political structure,

or rather an entity whose structure and function is predominantly commercial." *Transaero*, 30 F.3d at 151. Under that standard, the Ministry of the Treasury was part of the Polish state itself, not an agency or instrumentality.

Even if the Ministry *were* an agency or instrumentality, however, the takings exception still would not confer jurisdiction over the Republic of Poland because the seized property is not present in this country and the contacts of its agency or instrumentality under the second prong of the takings exception are not a proper basis for stripping the state itself of sovereign immunity. Section 1605(a)(3) is properly interpreted to strip immunity from a foreign state only if its own contacts satisfy the requirements for jurisdiction under the provision's first prong. That prong, which specifically addresses jurisdiction based on the contacts of the "foreign state," requires a much closer nexus with the United States than does the second prong, which provides for jurisdiction based on the contacts of "an agency or instrumentality of the foreign state." It would turn the provision on its head to permit these lesser contacts of the agency or instrumentality to support jurisdiction over the foreign sovereign itself. Instead, the second prong should be understood as overriding the immunity only of the agency or instrumentality with the contacts at issue.

Interpreting § 1605(a)(3) to require that the foreign state's own contacts, and not those of its agency or instrumentality, meet the requirements of the first prong of the provision is buttressed by the differential treatment accorded foreign states and their agencies and instrumentalities in the FSIA's attachment provision, 28 U.S.C. § 1610. That provision modifies only partially the "traditional view" that "the property of foreign states is absolutely immune from execution," while providing for more expansive rights of execution against the property of a

foreign agency or instrumentality. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. 6626. A litigant who receives a judgment of unlawful taking by a foreign state may execute the judgment against property owned by the state only if the property relates to the taking; in contrast, a similar judgment against a foreign agency or instrumentality may be executed against *any* property owned by that agency or instrumentality. *See* 28 U.S.C. § 1610(a)(3), (b). Congress clearly envisioned that the attachment provisions would parallel the immunity provisions of § 1605(a)(3). *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626.

Further, the historic treatment of expropriation claims prior to enactment of the FSIA supports its interpretation as providing jurisdiction over foreign states only where the seized property is present in this country in connection with the foreign state's commercial activity, while providing for jurisdiction over foreign state agencies or instrumentalities in a broader set of circumstances. Prior to enactment of the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, *see, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of *in rem* cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g., Stephen v. Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E. 2d 676 (1952). In contrast, separately incorporated state-owned companies engaged in commercial activities of a private nature were generally not accorded foreign sovereign immunity. *See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201-203 (S.D.N.Y. 1929). In creating for the first time an exception to the *in personam* immunity of a foreign state, Congress adopted an incremental approach granting jurisdiction over foreign states

that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had historically been the case, a broader class of cases against agencies and instrumentalities.

Plaintiffs contend that their interpretation of the takings exception is compelled by the text of the takings provision, asserting that, under § 1605(a), "a foreign state shall not be immune" in the specified circumstances, including the second prong of (a)(3), which confers jurisdiction based upon the commercial contacts of "an agency or instrumentality of a foreign state." Notably, under a literalistic reading of that text, together with the definition of "foreign state" in § 1603(a), the second prong of the takings exception would strip immunity to *all* of a foreign state's agencies and instrumentalities whenever *any one* of them owns seized property and engages in commercial activity in the United States. This result is plainly absurd, and is flatly at odds with the FSIA's legislative history, which makes clear that Congress did not intend to permit the sort of corporate veil-piercing advocated by plaintiffs. *See* H.R. Rep. No. 94-1487, at 29 (statute intended to "respect the separate juridical identities of different [foreign state] agencies or instrumentalities"), *reprinted at* 1976 U.S.C.C.A.N. at 6628; *see also, e.g., First National Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983). It would have made little sense for Congress to require that the instrumentality that owns or operates the seized property be the same instrumentality engaged in commercial activity in the United States in order for jurisdiction to exist under the second prong, if, once the test were satisfied, the state itself and all its instrumentalities would have been subject to suit.

In sum, the text, structure, and history of the FSIA's takings exception show that it is most reasonably interpreted to require that, before a foreign state will be denied immunity, the

seized property must be present in the United States in connection with a foreign state's own commercial activities.

Respectfully submitted,

WILLIAM H. TAFT, IV
Legal Adviser
U.S. Department of State

GREGORY G. KATSAS
Deputy Assistant Attorney General

MARK B. STERN
(202) 514-5089
SHARON SWINGLE
(202) 353-2689
Attorneys, Appellate Staff
Civil Division, Room 7250
Department of Justice
Washington, D.C. 20530-0001

cc: counsel listed on Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of September 2004, two copies of the foregoing letter brief for amicus curiae the United States of America were served on the following counsel by overnight delivery, postage prepaid:

Stephen A. Whinston
Edward W. Millstein
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103

Edward E. Klein
Klein & Solomon, LLP
275 Madison Ave., 11th Floor
New York, NY 10016

Mel Urback
Law Offices of Mel Urback
One Exchange Place, Suite 1000
Jersey City, NJ 07302

Joseph P. Garland
Law Office of Joseph P. Garland
275 Madison Ave.
New York, NY 10016

Kenneth F. McCallion
McCallion & Associates LLP
16 West 46th Street; 7th Floor
New York, NY 10036

J. Dennis Faucher
Miller Faucher Cafferty and Wexler LLP
One Penn Square West, Suite 2500
Philadelphia, PA 19102

Marvin A. Miller
Miller Faucher Cafferty and Wexler LLP
30 N. LaSalle Street; Suite 3200
Chicago, IL 60602

Kenneth A. Elan
Law Offices of Kenneth A. Elan
217 Broadway; Suite 606
New York, NY 10007

Owen C. Pell
Karen M. Asner
White & Case
1155 Avenue of the Americas
New York, NY 10036

Charles Chotkowski
P.O. Box 320079
Fairfield, CT 06825

_____

Sharon Swingle
Counsel for amicus curiae the
United States of America