No. 19-351

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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The decision below holds that foreign sovereigns can be sued in U.S. courts for actions within their own borders involving only their own nationals, whenever a plaintiff can plausibly allege a taking of property that implicates some human rights norm. And it holds that U.S. courts *must* hear such suits—because international comity provides no basis to abstain under any circumstances.

Plaintiffs do not dispute that the D.C. Circuit decision below split from other circuits, or that it departs from the Executive Branch on a matter of obvious foreign policy sensitivity. They do not dispute that it permits a wide variety of suits in U.S. courts against foreign sovereigns, alleging human rights abuses against their own nationals within their own borders. Indeed, Plaintiffs say nothing about the concern identified by the Executive Branch and the dissent below: that the decision risks reciprocal treatment by foreign nations, forcing the U.S. to defend itself in their courts against similar claims.

Instead, Plaintiffs mostly argue the merits, contending that these consequences are all *required* by the FSIA.[1] And they try to avoid this Court's resolution of the merits by inventing vehicle problems, making a waived and erroneous argument that the Consortium firms and their owners were not German, and a specious argument asserting that redress to German courts is futile.

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[1] This reply brief uses the abbreviations used in the petition.

This Court should grant review to determine how broad a net the expropriation exception casts over foreign sovereigns' interactions abroad with their own nationals, and whether the comity abstention doctrine presents any check on how deeply U.S. courts must intrude into foreign nations' histories and borders.

I. This Court should decide whether the expropriation exception provides jurisdiction over foreign sovereigns alleged to have expropriated property from their own nationals in violation of international human rights law.

The expropriation exception abrogates foreign sovereign immunity in cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605. This exception to immunity has always been an outlier in customary international law: As this Court has previously recognized, no other nation's sovereign immunity law recognizes a similar exception. *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017) (citing sources). Consistent with its plain language, which focuses on the law of expropriation, courts have long interpreted the exception to apply only to alleged violations of the established international law of takings. That meant the exception did not apply to a state's alleged taking of its own nationals' property, because such "domestic takings" are the concern of domestic, not international, law. *See* Pet. 3, 20.

The decision below departed from that consensus interpretation, expanding the expropriation exception to its breaking point. It held that foreign sovereigns must defend themselves in U.S. courts whenever someone alleges that the foreign sovereign has expropriated property in violation of *any* principle of international law, even when the state is alleged to have taken the property of its own nationals within its own borders. App. 2-16. As the dissent warned, the decision will have grave foreign policy consequences, inviting a host of lawsuits against foreign sovereigns for their domestic, sovereign acts—and may prompt other nations to reciprocate, forcing the United States to defend similar actions brought against it in foreign nations. App. 107. Understandably, the Executive Branch has previously opposed such an expansive interpretation of the FSIA. App. 137-53.

a. Plaintiffs offer no response to warnings that the D.C. Circuit decision, if left uncorrected, will raise diplomatic tensions and risk reciprocal assertions of jurisdiction against the United States abroad. Pet. 26-30. They do not remark on the fact that, under the D.C. Circuit's expansive interpretation of the expropriation exception, takings claims could be brought in U.S. courts against a number of European nations for their involvement in the Nazi era and against an even larger number of foreign states accused of perpetrating or being involved in genocide. *See* Pet. 25-26 (noting that suits have already been brought against Hungary, France, and Turkey based on similar theories). Nor do they contest the dissent's observation that the

rationale of the decision below "cannot be limited to genocide" and will permit claims against foreign sovereigns over alleged violations of a wide range of human rights norms, such as systematic racial discrimination. App. 108-09; *accord* Pet. 26-27.

Plaintiffs incorrectly portray the consequences of such suits as minor. It is true that under *Helmerich*, a district court must decide early in the case whether a plaintiff has alleged a taking in violation of international law. Opp. 20-21. But under the decision below, this is a low hurdle, surmounted whenever a plaintiff alleges that a foreign sovereign transgressed an international human rights norm in a commercial transaction. Plaintiffs observe that foreign sovereigns can invoke "common defenses" against these suits, Opp. 21, but the point of sovereign immunity is to protect foreign sovereigns from having to defend themselves in a U.S. court in the first place. Diplomatic tension—and the risk of reciprocal action against the United States—does not dissipate simply because a foreign sovereign may prevail on the merits after years of costly litigation in a U.S. court.

b. Plaintiffs' main argument against certiorari is that they think the decision below was correct. Defendants disagree, as Judge Katsas did in dissent, App. 107, and as has the Executive Branch, App. 137, 141-48. This Court should resolve that disagreement on the merits, following full briefing, but it bears mention now that Plaintiffs' merits argument is built on a network of missing pieces.

They proffer what they call a "plain text" interpretation of the phrase "takings in violation of international law," Opp. 9-11, but ignore the international law of takings that is the very object of the expropriation exception. *See* Pet. 18, 21-22; *see also Helmerich*, 137 S. Ct. at 1320-21 (noting that the expropriation exception "on its face emphasizes conformity with international law"); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (noting that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"). Plaintiffs make no effort to explain how the D.C. Circuit's interpretation of the expropriation exception can be squared with the other provisions of the FSIA or with other statutes using language nearly identical to the expropriation exception. Pet. 19-21. And they seemingly do not dispute that the interpretation of the exception offered by the D.C. Circuit *itself* violates international law, *see* Pet. 21-22 (discussing *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99, 136-42, ¶¶81-97 (Feb. 3)), thus running afoul of the well-established rule that statutes should be interpreted consistently with international law.

Plaintiffs try to shortcut these interpretative problems by asserting that because genocide is a violation of international law, "takings in violation of international law" must include takings that allegedly violate the international law of genocide. They incorrectly claim that *Helmerich* "approved" this interpretation. Opp. 11. All *Helmerich* held was that before permitting

an expropriation exception suit to proceed, a court must determine whether the facts alleged actually amount to a taking in violation of international law; a "nonfrivolous but ultimately incorrect argument" on that score does not suffice. 137 S. Ct. at 1316. In so holding, *Helmerich* stated that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law." *Id.* at 1321. But the Court in no way decided that those "fair" arguments were *correct*, as that question was not before the Court. *Id.* at 1321-22. This is the case that raises that unresolved issue, in the context of a foreign sovereign's alleged taking of its own nationals' property *within its own borders*.

Plaintiffs contend that the decision below accords with two unrelated acts of Congress. Opp. 14-16 (discussing the Holocaust Expropriated Art Recovery Act (HEAR Act) of 2016 and Holocaust Victims Redress Act (HVRA) of 1998). Both reiterate longstanding U.S. policy supporting justice and redress for Holocaust victims. But neither addresses the expropriation exception—or any part of the FSIA. Likewise, Plaintiffs assert that two Executive Branch documents from the 1940s—U.S. Military Government Law No. 59 and a 1949 State Department press release—reflect U.S. policy for the restitution of property seized in the Nazi era. Opp. 16, 1-4. Neither document addresses foreign sovereign immunity. Neither helps define the scope of the FSIA expropriation exception. The military law applied only in the part of occupied Germany administered by the U.S.

(per its Art. 95); the occupation ended decades before the FSIA was enacted. The press release was filed in connection with a case against a private defendant, not a foreign sovereign, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954), and was released decades before the FSIA.

Finally, Plaintiffs claim that the question presented is an "attack [on] the FSIA itself." Opp. 18-20. It is not. When codifying the restrictive theory through the FSIA, Congress chose to create a unique exception to sovereign immunity for certain expropriation claims. *See Helmerich*, 137 S. Ct. at 1318-19. The question presented here is how wide an exception was intended. Plaintiffs and the D.C. Circuit believe that Congress intended a very broad deviance from international law, allowing suit for a wide variety of alleged human rights violations committed by foreign nations against their own nationals in their own territory. Defendants and the dissent below, echoing the view previously expressed by the Executive Branch, believe that Congress intended a narrower exception, one that simply follows the established international law of takings.

c. Plaintiffs conclude their attack against the first question by manufacturing a vehicle problem. They argue—for the first time—that even if the expropriation exception is interpreted according to the consensus view, the takings alleged in this case are not domestic takings, because Nazi Germany stripped Jews of citizenship. Opp. 22-24. Plaintiffs have never

before raised this argument or disputed that this is a domestic taking. Their waived argument cannot be raised for the first time to avoid this Court's review. In any event, the argument lacks merit. As Plaintiffs themselves recognize, the only federal appeals court to actually decide this question squarely rejected Plaintiffs' argument. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 n.6 (7th Cir. 2012) (concluding that domestic citizenship laws are irrelevant to whether a taking is a domestic taking under international law). And even if the Plaintiffs' ancestors' citizenship under German domestic law were somehow relevant, the taking alleged here occurred before passage of the Nuremberg laws, which denied German citizenship to Jews. App. 11-12. Their own complaint alleges the loss of citizenship years *after* the alleged taking. *Id.*; *e.g.*, Supp. App. 59-60.

II. This Court should resolve the acknowledged circuit split over whether courts may abstain, based on international comity, from adjudicating cases under the FSIA expropriation exception.

The second question presented asks whether the doctrine of international comity is unavailable in cases against foreign sovereigns brought under the expropriation exception, even when a case is of immense historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims. Until the D.C. Circuit issued its decision below, courts could dismiss

cases against foreign sovereigns on the basis of international comity. As Judge Katsas's dissent noted, the elimination of the comity abstention doctrine "create[d] a clear split with the Seventh Circuit" and "disregard[ed] the views of the Executive Branch on a matter of obvious foreign policy sensitivity." App. 98.

a. Plaintiffs cannot deny the clear split, the Executive Branch's contrary views, or Judge Katsas's dissent below. Their efforts to minimize the import of these fractures are fruitless.

The split remains and is stark. Plaintiffs assert it "is resolving," Opp. 28, but cite only a single case, *Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019), which involves neither the expropriation exception nor the common-law doctrine of comity abstention.[2] They also maintain that the decision did not "set forth a 'new national rule'," Opp. 29, though they do not deny that the venue statute *always* allows suit in D.C. for claims against foreign states. And in denying its newness, they point only to a district court case (in D.C.) and an older D.C. Circuit case that they admit "did not rule definitively." Opp. 29.

The Executive Branch is clearly on record stating that the decision below is wrong and should be reviewed. In its amicus brief below, it stated the consistent U.S. position that "a district court may, in an

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[2] *Merlini* held that the FSIA commercial activity exception, 28 U.S.C. § 1605(a)(2), provides jurisdiction over a state workers' compensation claim brought by an employee who tripped on a cord in Canada's Boston consulate. 926 F.3d at 31.

appropriate case, abstain on international comity grounds from exercising jurisdiction over claims brought under the expropriation exception." App. 125-26. While Plaintiffs are correct that the United States has not yet taken a position on whether comity abstention should apply on the particular facts of this case, *see* Opp. 30, that does not somehow undermine the U.S.'s express opinion that the decision below is erroneous and important.

b. As they did with the FSIA, Plaintiffs primarily argue the merits. Opp. 24-29. They contend that because sovereign immunity reflects the principle of comity, the FSIA must have silently eliminated all common-law comity defenses. The FSIA displaced common-law sovereign immunity, but it did not displace other common-law defenses. As this Court has noted, there is "no reason to doubt that . . . [a court] may appropriately consider comity interests" when a sovereign *not* entitled to immunity must respond to discovery. *Republic of Argentina v. NML Capital Ltd.*, 573 U.S. 134, 146 n.6 (2014).

Plaintiffs also argue that while comity can bar suits by one sovereign against another, it cannot bar suits brought by a private party against a sovereign. Were that true, foreign sovereigns would have less protection than individuals, despite the FSIA's clear admonition 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. This Court has strongly suggested that private defendants may invoke comity as a defense in similar

circumstances. *See* Pet. 37 (collecting cases); *see also id.* at 37-38 (noting that Indian tribes, as domestic sovereigns, may invoke comity as a defense to suits brought by non-sovereigns).

None of that matters, however, at this stage. The critical point is that the question is important and urgent and has split the courts of appeals and set the Executive Branch against the D.C. Circuit.

c. Plaintiffs' effort to manufacture a vehicle problem fares no better than their efforts to diminish the importance of the question presented.

They maintain that this case is not a "suitable vehicle" because, even if comity abstention permits dismissal, dismissal would be inappropriate here. Opp. 35-39. Defendants disagree, of course, but that disagreement does not undermine the vehicle. This case presents the question squarely and starkly, complete with a dissent and the clearly-articulated contrary views of the Executive Branch.

Plaintiffs' arguments about why comity abstention would not apply here nevertheless miss the mark. First, they contend that seeking remedies in German courts would have been futile. Opp. 36-38.[3]

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[3] Plaintiffs presume that comity abstention means only "prudential exhaustion." Opp. 35. Comity abstention includes exhaustion, but is not limited to it. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993) (acknowledging the possibility of declining jurisdiction "under the principle of international comity" if conduct prohibited by U.S. law were required by foreign law).

The opposing German-law experts presented to the district court agreed that the post-war-era restitution statutes specific to the Nazi era had expired. *See* App. 195-96, Supp. App. 136. They disagreed whether ongoing general civil law allows plaintiffs to seek a resolution on the merits of their claim for restitution of property allegedly taken during the Nazi era. Plaintiffs' expert acknowledged that *Sachs*, a 2012 decision from Germany's Federal Court of Justice, permitted plaintiffs to use the general civil law to seek restitution of art seized during the Nazi era; but he described that high court decision as "singular" and not "tested." Supp. App. 139. Defendants' expert took *Sachs* at its word, as having "articulated with rare clarity that," where the circumstances warrant, German courts "will not support any perpetuation of Nazi injustice." App. 209. *Sachs*, he explained, "reserved the right to assess on a case-by-case basis" whether plaintiffs can maintain restitution claims under general civil law, if the preclusion of claims brought under the specific post-war statues "would lead to a continuation of Nazi injustice." App. 206. Plaintiffs—whose own expert acknowledges *Sachs*—never tried to "test" the decision; they never tried to explain to German courts why they come within the *Sachs* standard.

Second, citing a Restatement comment, but no cases, Plaintiffs contend that international law does not require exhaustion when a sovereign denies wrongdoing. Opp. 38. Under their interpretation, raising the defense of exhaustion would defeat it. That "argument proves too much, for it would excuse use of domestic remedies in any case that is actually

contested." *Abelesz*, 692 F.3d at 683 (distinguishing between "legislation, executive statement, or case law indicating that the [foreign sovereign] government denies these events or would refuse to entertain claims for losses related to the Holocaust" and simple "decisions to defend themselves" on the merits).

Plaintiffs also contend that an exhaustion requirement is "less likely" to be applied here, where the claims involve international human rights claims brought in part by U.S. citizens, making the "U.S. interest . . . strong." Opp. 39. Their speculations as to what is "likely" are irrelevant, as the Executive Branch below directly articulated the U.S. interest: to recognize the ongoing availability of the doctrine of international comity abstention in appropriate cases under the expropriation exception.

Respectfully submitted,

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