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

BRIEF FOR PETITIONERS

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

JONATHAN M. FREIMAN
Counsel of Record
TADHG DOOLEY
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

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the "expropriation exception" of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign state violated international human-rights law by taking property from its own national within its own borders, even though such claims do not implicate the established customary international law addressing states' expropriation of property.

(2) Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign and where the foreign nation has a domestic framework for addressing the claims.

PARTIES TO PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Federal Republic of Germany ("Germany"), a sovereign nation, and Stiftung Preussischer Kulturbesitz ("SPK"), a German governmental institution comprising museums, archives, and research institutions. Neither is a corporation, has a corporate parent, or is owned in whole or part by any publicly held company.

Respondents are U.K. citizen Alan Philipp and U.S. citizens Gerald Stiebel and Jed Leiber.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The district court's order denying the motion to dismiss is at 248 F. Supp. 3d 59, reproduced at Pet.App.37–93. The court of appeals' panel opinion is at 894 F.3d 406, reproduced at Pet.App.1–24. The order denying petitioners' petition for rehearing en banc, along with Judge Katsas's dissent, is at 925 F.3d 1349, reproduced at Pet.App.96–118.

JURISDICTION

The court of appeals entered judgment on July 10, 2018, and denied rehearing en banc on June 18, 2019. The petition for writ of certiorari was filed on September 16, 2019. The petition was granted on July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced as an Addendum to this brief.

STATEMENT OF THE CASE

This case presents two related questions. The first is whether the FSIA's "expropriation exception," 28 U.S.C. § 1605(a)(3), subjects foreign sovereigns to claims in U.S. courts that they unlawfully took property from their own nationals within their own

territory. The second is whether, if the expropriation exception permits such claims, courts lack the power to abstain from exercising jurisdiction when hearing such a claim would offend international comity. The court of appeals concluded that Congress granted jurisdiction over foreign sovereigns in such suits and divested courts of their authority to abstain from such cases. These holdings radically restructure foreign-relations law and jeopardize foreign affairs. Congress intended neither.

Under customary international law, states are immune from suit in foreign courts over their sovereign acts. While the expropriation exception departs somewhat from that principle by allowing suit against foreign states for property expropriations, for decades U.S. courts narrowly interpreted the exception—in line with the international law of expropriation—as not reaching states' takings of their own nationals' property. That consensus interpretation of the exception limited its extraterritorial reach and cabined U.S. divergence from international practice. The decision below abandoned the consensus view, holding that the expropriation exception provides jurisdiction not just over alleged violations of the law of expropriation, but over claims that a foreign state's taking violated *other* principles of international law. The decision thus allows U.S. courts to decide whether a foreign state violated international human-rights law by taking its own nationals' property. In so doing, the court of appeals transformed the expropriation exception into a vast grant of federal jurisdiction over foreign states.

Congress never intended this result. In drafting the expropriation exception, it used language that incorporated the established law of expropriation, abrogating foreign states' immunity only for violations of that body of law. The text, context, and history of the FSIA confirms this. All cut against deputizing U.S. courts to judge foreign states' sovereign acts within their own borders. That misreading of the exception would upend the careful balance between sovereign immunity and international law that Congress struck when it drafted the FSIA. And it would depart sharply from this Court's precedents recognizing the dangers of U.S. courts' assuming jurisdiction over extraterritorial disputes involving foreign parties injured abroad.

The court of appeals compounded its error by jettisoning comity-based abstention in cases against foreign sovereigns. Courts have long had the authority to abstain from hearing suits that are of profound importance to foreign sovereigns but have no meaningful connection to the United States. Nothing in the FSIA eliminated this long-standing doctrine. This case presents a prime example of circumstances appropriate for comity-based abstention.

Left standing, the court of appeals' decision weakens the Executive Branch role in foreign affairs, invites international friction, and risks reciprocal treatment by foreign sovereigns allowing their courts to judge the U.S.'s own historical wrongs. This Court should restore the consensus view of the expropriation exception and the ordinary working of the common-law defense of

comity. Under either, Respondents' claims must be dismissed.

I. Factual Background

This case is about the ownership of a collection of medieval reliquaries called the Welfenschatz or Guelph Treasure. In 1929, several German art dealerships owned by Jewish-German art dealers formed a "Consortium," a corporate entity like a partnership, which bought the collection a few weeks before the 1929 stock market crash. Pet.App.39–40.

In the ensuing worldwide Great Depression, the Consortium spent years trying to sell the Welfenschatz around the world, but managed to sell only half the pieces due to depressed economic conditions. It stored the remainder of the pieces in the Netherlands for several years. Pet.App.3.

In 1934, about a year after the Nazi party took power in Germany, the Dresdner Bank approached the Consortium with an offer for the remaining pieces on behalf of the (German) state of Prussia. Pet.App.40–42; Joint.App.75–80. The Consortium and the bank negotiated for over a year before agreeing on a price of 4,250,000 RM (about $1,700,000 in 1935 dollars), about halfway between the two sides' opening positions. Pet.App.42–44. That price for the remaining pieces amounted to roughly sixty percent (in nominal terms) of what the Consortium paid for the complete collection in 1929. *Id.*

Since then, the collection has been displayed in German public museums almost continuously. Pet.App.4. For more than sixty years after World War II, neither the Consortium, the art dealerships, nor any of the dealerships' owners or their heirs challenged the sale. But in 2008, some successors-in-interest of some owners of some of the art dealerships contacted SPK, claiming the sale occurred under duress and was invalid.

SPK took the claims seriously. This was not surprising. As the United States has observed, "the German government has provided roughly $100 billion (in today's dollars) to compensate Holocaust survivors and other victims of the Nazi era." Pet.App.125. This includes playing a central role in the restitution of Nazi-looted art. In 1998, Germany joined the U.S. and forty-two other nations in signing the Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles"), which call on signatories to establish domestic alternative dispute resolution mechanisms for resolving Nazi-looted art claims on the merits, in a manner consistent with each nation's traditions. *See* U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art (1998), http://www.lootedart.com/web_images/pdf/WashingtonConferencePrinciples_Original_080630.pdf.

Honoring Germany's commitments under the Washington Principles, SPK has investigated the provenance of pieces in its collections and restituted hundreds of works. *See* Christopher F. Schuetze, "U.S. Supreme Court to Rule on Medieval Treasure Bought

by Nazis," *New York Times*, July 10, 2020 (discussing SPK's restitution of 350 artworks resulting from 50 restitution requests and SPK's own independent provenance inquiries).

SPK investigated the history of the sale and found it was a voluntary, fair-market transaction. Respondents disagreed and requested that the parties submit the dispute to the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (the "Advisory Commission"), an alternative dispute resolution mechanism established by Germany under the Washington Principles to hear restitution claims on the merits. Pet.App.44–45.

The Advisory Commission was chaired by Jutta Limbach, the former chief justice of Germany's Federal Constitutional Court, and included a former head of the German Parliament and a former President of Germany. It reviewed documentary evidence and held a hearing on the merits with expert witnesses. Although the Advisory Commission has recommended restitution in other cases, here it concluded that the collection was sold for fair-market value, after arm's-length negotiations—not under duress—and at a price reflecting the effect of the Great Depression on the art market. It recommended against restitution. Pet.App.4–5, 44–45.

II. Procedural History

Dissatisfied with the Advisory Commission's recommendation, Respondents sued. Though they could have sued in German courts, they sued in D.C., invoking the expropriation exception as a jurisdictional basis for common-law claims seeking restitution of the Collection, or a quarter billion dollars. Pet.App.5. Respondents focused not only on the sale, but also on the Advisory Commission, which they attacked as a "sham," Joint.App.43–44, 106, a "rubber stamp," and "a political fig leaf to disguise Germany's hostility to bona fide restitution claims." Appellees' Br. at 35, 45, *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406 (D.C. Cir. 2018) (No. 17-7064), 2018 WL 5098952, at *35, *45.

Petitioners moved to dismiss. After the district court denied the motion in relevant part, Pet.App.92–93, Petitioners appealed, and a panel of the D.C. Circuit affirmed in relevant part, Pet.App.24. It recognized that "an intrastate taking—a foreign sovereign's taking of its own citizens' property—*does not violate the international law of takings*," but held that "an intrastate taking can nonetheless subject a foreign sovereign and instrumentalities to jurisdiction in the United States where the taking amounted to the commission of genocide." Pet.App.7.[1] It then held that the sale bore a sufficient connection to genocide, because Respondents alleged that Prussia viewed the

[1] Throughout this brief, unless otherwise indicated, emphasis has been added and internal quotation marks, ellipses, or citations have been deleted.

Consortium members as enemies of the state, wished to "Aryanize" the Collection, and paid a price below market value. Pet.App.7–15. This, the panel concluded, meant that *the sale itself amounted to an act of genocide* and therefore constituted a taking in violation of international law under the expropriation exception. *Id.*[2] The panel further held that when the FSIA provides jurisdiction, courts cannot abstain based on international comity, despite the depth of the foreign sovereign's interest, the diplomatic sensitivity for the U.S., or the foreign sovereign's own domestic efforts to address such claims. Pet.App.16–21.

Petitioners sought rehearing en banc, which the U.S. supported. Pet.App.119–36. The court of appeals denied en banc review. Pet.App.97. Judge Katsas dissented. Pet.App.97–118. In his view, the panel interpreted the expropriation exception unreasonably, contrary to the broader statutory context, and in a manner that itself violates international law, because it denies foreign states immunity where customary international law requires it. Pet.App.101–07. Judge Katsas also disagreed with the panel's conclusion that international comity provides no basis for abstaining from suits brought against foreign sovereigns; he concluded that the FSIA's language "affirmatively accommodates" such defenses. Pet.App.110–11. Taking these points together, Judge Katsas warned that the decision

---

[2] The expropriation exception also requires "an adequate commercial nexus between the United States and the defendant." Pet.App.15. The court of appeals concluded this was not met for Germany.

would have "grave consequences," Pet.App.107, as it "clears the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories," Pet.App.98, and precludes U.S. courts from abstaining based on comity from these diplomatically sensitive suits, Pet.App.110–15.

Petitioners sought certiorari, asking this Court to reverse the court of appeals' decision on the scope of the expropriation exception and its refusal to dismiss the case based on concerns of international comity. On invitation from this Court, the United States filed an amicus brief agreeing with Petitioners and recommending that the Court grant certiorari on both issues. Brief of U.S. as Amicus Curiae, *Fed. Republic of Ger. v. Philipp* (Sup. Ct.) (No. 19-351). The Court granted certiorari on both issues.[3]

SUMMARY OF THE ARGUMENT

I. For the first four decades of the FSIA, courts universally understood the expropriation exception as not providing jurisdiction over "domestic takings," i.e., takings by a foreign sovereign of its own national's property within its own borders. That consensus understanding bars Respondents' claims that a German state "took" the property of a German corporate entity owned by German nationals when that entity sold the

[3] In the past week, Germany has been copied on several diplomatic *notes verbales* sent to the United States from foreign sovereigns addressing both issues in this case. Germany will seek to lodge these with the Court pursuant to Rule 32.3.

Welfenschatz to Prussia, allegedly for less than its market value, in 1935. But the court of appeals discarded this consensus, permitting Respondents' claims to proceed under the theory that the below-market sale of an art collection was a genocidal act not subject to the domestic-takings rule. By expanding the expropriation exception to provide jurisdiction over alleged takings in violation of *any* principle of international law, the court of appeals turned the exception into a tool for suing foreign states for alleged violations of the human rights of their own nationals in their own territory. This interpretation should be rejected for several reasons.

First, the phrase "taken in violation of international law" is a term of art that must be given the meaning it had when Congress enacted the FSIA in 1976. Contemporary legal sources used the same words to refer to violations of the customary international law of expropriation, a body of law that does not apply to domestic takings. The legislative history confirms that Congress understood the exception as a term of art, incorporating this body of international law. Congress's use of similar language in another statute—one that already had been interpreted to exclude domestic takings when the FSIA was enacted—establishes that Congress understood the expropriation exception to have this meaning and that it expected courts to interpret it that way.

Second, the court of appeals' interpretation of the expropriation exception conflicts with the context and purpose of the FSIA, the international law of immunity, and broader principles on the extraterritorial

reach of U.S. jurisdictional statutes. The exception's language focuses on unlawful invasions of property rights. The body of international law addressing invasions of property rights is the customary international law of expropriation, so the exception is naturally read as referring to violations of those principles. The law of genocide, by contrast, addresses mass murder, and it criminalizes killing or seriously harming protected groups with genocidal intent. It is not an international doctrine of property rights and does not fit with the expropriation's focus.

Other FSIA exceptions explicitly address wrongs to persons, including violations of human rights. Congress carefully cabined those exceptions to avoid injecting U.S. courts into disputes with little connection to the United States. None of those exceptions applies here. The expropriation exception should not be interpreted to undo the careful balance Congress struck when it wrote exceptions directly addressing violations of human rights and harms to persons.

The court of appeals' approach also causes the United States to violate international law. The customary international law of state immunity obliges states to give immunity to foreign sovereigns in their domestic courts for sovereign (as opposed to commercial) acts—even when a state allegedly violates human rights or jus cogens norms. The International Court of Justice has squarely held that states violate international law when they refuse to extend immunity to foreign sovereigns for such suits. Yet the court of appeals did just that. The expropriation exception should not be interpreted to itself violate international law.

The court of appeals' decision also runs contrary to the FSIA's purpose. Congress intended the FSIA to codify the restrictive theory of sovereign immunity, under which states are immune for sovereign acts—such as takings of property within their own borders—but not for commercial acts. It did not intend the expropriation exception as a "radical departure" from this restrictive theory. But the court of appeals' decision leads to that radical departure. It opens the floodgates to sensitive diplomatic and political suits requiring foreign states to answer in U.S. courts for actions toward their own nationals within their own borders that allegedly violate international law. And it creates serious risk that foreign states will reciprocate, forcing the United States to defend itself abroad over its own sovereign acts here.

Finally, the court of appeals' expansion of the expropriation exception conflicts with this Court's repeated warnings against extending U.S. jurisdictional statutes to reach claims that do not concern the United States, absent a clear congressional command. It is hard to imagine a context where those warnings sound with greater force than the FSIA, which allows suits not against private entities, but against foreign sovereigns themselves.

II. The court of appeals compounded its error by concluding that the FSIA displaced principles of international comity, which would otherwise counsel against exercising jurisdiction here.

Comity has long cautioned against reexamining or condemning the sovereign acts of another nation, recognizing that doing so imperils foreign relations and the peace of nations. Comity principles give federal courts discretion to abstain from cases that have little connection to the United States and present serious foreign policy risks. While its principles animate doctrines such as forum non conveniens, act of state, and the presumption against extraterritoriality, comity remains an independent abstention doctrine, invoked by lower courts and supported by several of this Court's recent decisions, including those addressing the Alien Tort Statute ("ATS").

The court of appeals acknowledged the comity abstention principle, but believed the FSIA made it unavailable to foreign sovereign defendants. The court of appeals was wrong for several reasons. It conflated sovereign immunity with non-jurisdictional comity-based abstention, a common law doctrine that focuses not on the identity of the defendant but the nature of the suit. It also misconstrued this Court's precedents and the plain text of the FSIA, which provides that foreign sovereigns can assert the same defenses as private litigants. Since private defendants can invoke comity-based abstention, the FSIA requires that foreign sovereigns be allowed to invoke that same defense.

The principles of international comity require abstention here. Respondents invoke the defining horror of German history—the Holocaust—while also attacking the mechanisms that Germany adopted to address,

accept, and atone for the Nazi era. They do so in a case that would require U.S. courts to decide ownership of a collection of medieval German artifacts held in a German state museum, assess Germany's treatment of a German consortium owned by German firms that were themselves owned by German nationals, and pass judgment on Germany's modern-day efforts to address its history. Germany has a profound interest in hearing this case. The U.S. interest lies not in having U.S. courts judge this foreign dispute, but in encouraging compliance with the Washington Principles that the United States helped establish and continues to strongly support.

ARGUMENT

I. Petitioners are immune under the FSIA.

A. Statutory Background

Foreign sovereign immunity derives from the universally shared understanding that "foreign nation states [are] independent sovereign entities." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017). Granting foreign states immunity from suit in U.S. courts promotes "the independence and dignity" of foreign states and encourages foreign states to grant the same treatment to the United States. *Id.* at 1319–20.

For most of U.S. history, foreign states enjoyed absolute immunity from suit in U.S. court. *See Permanent Mission of India to the United Nations v. City of New*

York, 551 U.S. 193, 199 (2007). In 1952, the State Department adopted the "restrictive" theory of sovereign immunity, recognizing foreign sovereign immunity for a state's "sovereign or public acts" but not for its commercial or "private acts." *Id.*[4] But the State Department's application of the restrictive theory was inconsistent. *Samantar v. Yousuf*, 560 U.S. 305, 312–13 (2010). Congress responded to that problem by enacting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11, which aimed "to endorse and codify the restrictive theory of sovereign immunity" and to transfer responsibility for deciding immunity claims from the State Department to the courts. *Samantar*, 560 U.S. at 313.

The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Id.* at 314. It grants states a presumption of immunity, limited only by specific statutory exceptions. *Id.* at 313–14; *see* 28 U.S.C. § 1604. Consistent with Congress's purpose of codifying the restrictive theory, nearly all these exceptions "involve commerce or immovable property located in the United States." *Helmerich*, 137 S. Ct. at 1320. The FSIA thus "by and large continues to reflect basic principles of international law, in particular . . . the restrictive theory of sovereign immunity." *Id.*

---

[4] This approach has become customary international law. Restatement (Fourth) of the Foreign Relations Law of the United States § 454 cmt. h (2018) ("Restatement Fourth").

B. The original understanding of the expropriation exception does not reach the domestic takings alleged here.

The court of appeals found Petitioners stripped of their sovereign immunity under the FSIA's expropriation exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in 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.

28 U.S.C. § 1605(a)(3). The exception has three basic elements. First, a plaintiff must allege that a "*property* right [has been] *taken in violation of international law*." *Helmerich*, 137 S. Ct. at 1319 (emphasis original). Second, the plaintiff's claim must place that right "at issue." *Id.* Finally, the property must have a specified "commercial connection with the United States." *Id.* at 1320–21.[5]

---

[5] This Court has twice examined the exception. *Helmerich*, 137 S. Ct. 1312, decided the pleading standards. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), decided whether the

The exception prompted few suits largely because of how courts interpreted the phrase "rights in property taken in violation of international law." For its first four decades, the exception was understood to codify the customary international law of expropriation as it existed when Congress enacted the FSIA. *See* Restatement (Second) of the Foreign Relations Law of the United States § 185 (1965) ("Restatement Second") (explaining "When [a] Taking is Wrongful under International Law"). A state violates that body of customary international law if it takes *a foreign national's* property without a public purpose, in a discriminatory manner, or without full compensation. *Id.*; *accord* Ursula Kriebaum & August Reinisch, *Property, Right to, International Protection* ¶¶ 2, 19, in Oxford Public International Law (2019) ("Kriebaum & Reinisch").[6] This body of international law only addresses a state's taking of *foreign nationals'* property, because only foreign takings implicate the concerns of the international legal system. *See* Kriebaum & Reinisch ¶ 2 (noting that "any uncompensated taking of property belonging to nationals of another State would lead to an unjustified transfer of wealth from that State to the expropriating

---

FSIA applied to pre-FSIA conduct. Neither case decided the meaning of the exception. *See id.* at 692.

[6] In this context, "discrimination" means "unreasonably treating an alien differently than nationals." Restatement Second § 166. It does not include a state discriminating against some of its own nationals. *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 857–58 (7th Cir. 2015) (discussing an analogous provision in the subsequent Restatement).

State"); *accord* Frank G. Dawson & Burns H. Weston, "*Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727, 728 (1962) (explaining why only foreign takings implicate international law). As this Court recognized long ago, "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *United States v. Belmont*, 301 U.S. 324, 332 (1937).

Because a state's alleged taking of its own national's property is not a "taking in violation of international law," courts have consistently held that it does not fall within the expropriation exception. *See*, *e.g.*, *Mezerhane v. Republica Bolivariana de Venez.*, 785 F.3d 545, 548–51 (11th Cir. 2015); *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395–98 (5th Cir. 1985). Courts apply this "domestic-takings rule" even in cases involving serious human-rights violations. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (9th Cir. 1992) (holding expropriation exception did not abrogate immunity for Argentine military junta's alleged anti-Semitic campaign of violence, torture, and expropriation of property from its own nationals). Members of this Court have recognized this "consensus view" of the lower courts and noted that it prevents U.S. courts from imposing "vast . . . liability [on foreign states] for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international

negotiation and agreement." *Altmann*, 541 U.S. at 713 (Breyer, J., concurring).

This understanding of the exception bars Respondents' claims. They allege that three art dealerships in Germany formed a Consortium, which bought the Welfenschatz in 1929 and sold it six years later to an intermediary for the Prussian State, allegedly for less than its market value. Joint.App.43, 63, 141–147, 182–88. Based on the allegations in the complaint, this Consortium was formed and operated in Germany. Joint.App.43, 63, 75–76, 98. Under German law, it owned the Welfenschatz and still owns any present-day legal claims over the collection. *See* Joint.App.207–229; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 213 (1987) ("Restatement Third") (noting that international law treats corporate entities as nationals of their state of incorporation). The three art dealerships—the alleged members of the Consortium—were themselves German corporate entities. Joint.App.43, 63, 216–217. Finally, the individuals who owned these art dealerships were German nationals. Joint.App.43, 48, 89–90, 99–101. Respondents thus alleged a domestic taking, not a taking "in violation of international law."[7]

---

[7] Respondents never disputed below that their complaint alleges that Germany expropriated property from German nationals. They have forfeited any novel argument to the contrary. *See*, *e.g.*, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397–98 (2015).

C. The court of appeals' expansion of the expropriation exception to alleged violations of human-rights law conflicts with the statute's text, context, history, and purpose.

The court of appeals acknowledged that "a foreign sovereign's taking of its own citizens' property . . . does not violate the international law of takings." Pet.App.7. But it read the exception to reach takings that violate *any* international-law norm, not just the international law of expropriation. *Id.* The Court should reject this novel approach, which contravenes the text, context, history, and purpose of the FSIA.

1. The court of appeals abandoned the consensus view that the expropriation exception applies only to foreign takings.

The court of appeals first abandoned the consensus view of the exception in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). In *Simon*, Jewish plaintiffs and their heirs—all former Hungarian nationals—sued Hungary for its participation in the Holocaust in 1944. *Id.* at 133–34. The court of appeals dismissed their claims for personal injury or death, recognizing that no FSIA exception covered claims for such acts committed abroad. *Id.* at 141. But it permitted the plaintiffs to seek damages for alleged expropriations of property—their clothes, food, medicine, and shelter—concluding that these takings violated the international law *of genocide*. *Id.* at 142–44. Genocide

prohibits "[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part" with the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Convention on the Prevention and Punishment of the Crime of Genocide, art. 2(c), Dec. 9, 1948, 78 U.N.T.S. 277 ("Genocide Convention"). *Simon* concluded that plaintiffs' claims met this definition, because these expropriations of "resources needed to survive as a people" were "undertaken for the purpose of bringing about a protected group's physical destruction." *Id.* at 143. And because the law of genocide, unlike the law of expropriation, applies to states' treatment of their own nationals, *Simon* held it made no difference whether Hungary took the property from its own nationals. *Id.* at 144–46.[8]

The court of appeals extended *Simon* here. It concluded that Respondents' allegations that their ancestors sold a collection of medieval artifacts to the German state in 1935 for $1.7 million—allegedly less than market value—amounted to an allegation of genocide. Pet.App.7–15. Even if the court of appeals' extension of *Simon* to the very different facts of this case

---

[8] *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), involved nearly identical factual allegations. The Seventh Circuit likewise abandoned the previous consensus view, holding that expropriations that form an "integral part" of a plan to "effectuate[ ]" genocide fall within the expropriation exception. *Id.* at 673–77. It nonetheless dismissed based on international comity. *Id.* at 678–85.

were correct—and it was not—its interpretation of the exception should be rejected.

2. "Taken in violation of international law" is a term of art meaning violations of the international law of expropriation.

The court of appeals' interpretation runs contrary to how Congress understood "taken in violation of international law" when it enacted the FSIA. That phrase had an established meaning, reported in the Restatement, used in another statute, and reflected in the FSIA's legislative history: takings in violation of the customary international law of expropriation.

When a statute uses a term of art, courts assume that "Congress intended [the term] to have its established meaning," absent a "contrary indication." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). That is so even if, stripped of context, the plain language could be understood differently. *See*, *e.g.*, *Hall v. Hall*, 138 S. Ct. 1118, 1124–25 (2018); *Merck & Co. v. Reynolds*, 559 U.S. 633, 644–45 (2010). This principle applies not only to the definitions of terms but also to "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012). In Justice Frankfurter's famous phrase, when Congress "transplant[s]" a statutory term from another legal source, the term "brings the old soil with it," namely, the limits and qualifications of that term in the legal

sources it was drawn from. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

This Court has often applied this cardinal rule of interpretation to the FSIA, giving its terms their meaning in the customary international law of 1976. For example, in *Republic of Argentina v. Weltover*, 504 U.S. 607, 612–13 (1992), this Court recognized that the word "commercial" in the FSIA's commercial-activities exception was a term of art and gave it "the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." And in *Permanent Mission*, this Court relied on "international practice at the time of the FSIA's enactment," as established by the Restatement Second, to determine the scope of the FSIA's immovable-property exception. 551 U.S. at 200. Treating the FSIA's language as terms of art is particularly apt, because the statute aimed "to endorse and codify" an existing body of law: the international law of state immunity. *Samantar*, 560 U.S. at 313.

Like other terms in the FSIA, the phrase "taken in violation of international law" is a term of art. The Restatement Second—"[t]he most recent restatement of foreign relations law at the time of the FSIA's enactment," *Permanent Mission*, 551 U.S. at 200—explains this term in Section 185, where it defines "[w]hen [a] [t]aking is [w]rongful under [i]nternational [l]aw." It states that only the taking "by a state of property of *an alien*" is unlawful under international law, and only

when the taking of the alien's property is not for a public purpose, lacks payment of just compensation, or is discriminatory under Section 166. Restatement Second § 185 & cmt. a; *see also* Amir Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 Vill. L. Rev. 199, 199 & n.1 (1969) (describing international law of expropriation and noting that it "does not regulate the relations between states and their nationals"); Dawson & Weston, 30 Fordham L. Rev. at 728–36 (summarizing history of this body of law and its limitation to expropriations of foreign nationals' property). Congress incorporated this understanding into the FSIA when it used language following the description of this body of law in contemporary sources like the Restatement.

The legislative history confirms that Congress invoked this settled meaning. *See T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301 (2015) (looking to legislative history to confirm that statutory language was a term of art). The House Report on the FSIA contains little discussion of the expropriation exception, but in the brief passage addressing it, the report noted:

> The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature.

H.R. Rep. No. 94-1487, at 19–20 (1976). This three-part formula—takings without compensation, lacking a

public purpose, or that are discriminatory—directly follows contemporary discussions of the customary international law of expropriation. *See* Restatement Second § 185 & cmt. a (explaining "[w]hen [a] [t]aking is [w]rongful under [i]nternational [l]aw" using a similar formula). The authors of the current Restatement agree that Congress understood the exception to mean takings in violation of the customary international law of expropriation. Restatement Fourth § 455, note 4; *see also id.*, note 6 (observing that *Simon* "appears to expand the scope of § 1605(a)(3) well beyond the original intent of the Congress").

It should come as no surprise that Congress invoked this body of international law when it drafted the expropriation exception. For decades, Communist states had engaged in extensive expropriations of aliens' property, particularly that of U.S. nationals. The issue reached the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which asked this Court to decide competing claims of ownership over U.S. sugar interests that Cuba had nationalized. But the Court declined, holding that the act-of-state doctrine prevents U.S. courts from deciding the validity of the "public acts [of] a recognized foreign sovereign power committed within its own territory." *Id.* at 401, 427–37. The Court noted, however, that Cuba's nationalization of American-owned property without compensation was widely viewed as violating the international law of expropriation and observed that "Communist countries . . . commonly recognize no obligation" to compensate foreign owners for taken property. *Id.* at 429.

Congress immediately responded to *Sabbatino* by enacting the so-called Second Hickenlooper Amendment. It generally prohibits U.S. courts from applying the act-of-state doctrine when "a claim of title or other right to property is asserted . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." 22 U.S.C. § 2370(e)(2).[9] Congress used the phrase "taking . . . in violation of . . . international law" to allow claims against foreign nations (particularly Communist states) for expropriation or nationalization of American-owned property without compensation—straightforward violations of the customary international law of expropriation. Courts interpreting the amendment recognized that its reference to "taking[s] . . . in violation of the principles of international law" meant violations of the customary international law of expropriation, not domestic takings. *See F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966) ("[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law."). Congress codified that interpretation when it used nearly identical language in the FSIA several years later. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009).

---

[9] The FSIA's legislative history notes the connection, directly citing the Second Hickenlooper Amendment in its discussion of the expropriation exception. H.R. Rep. No. 94-1487, at 19–20.

3. The text, context, and purpose of the FSIA support the original understanding of the exception.

The specific meaning Congress invoked by using an established term of art is also the most natural understanding of the expropriation exception's language in context. This Court has observed that the phrase "rights in property taken in violation of international law" leaves the precise requirements for triggering the exception somewhat ambiguous. *Helmerich*, 137 S. Ct. at 1319. Here, the textual emphasis on rights *in property* suggests that, to displace the presumption of sovereign immunity, the international norm violated must be one concerned with property rights. Even if the literal meaning could support the broad interpretation that *any* violation of international law suffices, that reading clashes with statutory context and congressional purpose. Whether a statutory phrase "extend[s] to the outer limits of its definitional possibilities . . . depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006); *see also Maracich v. Spears*, 570 U.S. 48, 59–60 (2013). This Court has applied these principles to the FSIA, declining to adopt interpretations of the Act that are "literally possible" but that context shows are "not the meaning that Congress enacted." *Samantar*, 560 U.S. at 314–15. Whatever ambiguity "taken in violation of international law" may have in isolation, the language of the exception as a whole, and the context

and purpose of the rest of the FSIA, show that only the original understanding of the exception is "compatible with the rest of the law." *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

a. First, the plain reading of the full exception supports the original understanding. "[W]hen interpreting a statute, [courts] construe language in light of the terms surrounding it." *F.C.C. v. AT&T Inc.*, 562 U.S. 397, 405 (2011); *see also Abuelhawa v. United States*, 556 U.S. 816, 819–20 (2009) (noting that statutes "are not read as a collection of isolated phrases" but interpreted as a whole). The court of appeals' approach violates this rule, divorcing the phrase "in violation of international law" from the exception's focus on property rights.

Several phrases of the exception emphasize property rights. *Helmerich* recognized that the exception requires a plaintiff's claims to place at issue a "*property* right *taken in violation of international law*." 137 S. Ct. at 1319 (emphasis original). And it requires that the property taken have a commercial nexus with the United States. Given the exception's focus on property-right violations, it is natural to interpret it through the body of international law addressing states' interference with property rights: the customary international law of expropriation. *See* Restatement Second § 185; Kriebaum & Reinisch ¶¶ 9–23, 41–48 (discussing when international law protects private property); *cf. Maslenjak v. United States*, 137 S. Ct. 1918, 1924–27 (2017) (rejecting argument that the phrase "procure, contrary to law, the naturalization of any person"

includes violations of *any* law while procuring citizenship, and confining its application to violations of law that contributed to obtaining citizenship).

International human-rights law, by contrast, protects not property rights but "such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment." *De Sanchez*, 770 F.2d at 1397; *accord* Restatement Third § 702 (describing the customary international law of human rights). These are rights of people and peoplehood, not "property" rights and their commercial nexus to the United States. Nowhere is that truer than with genocide, which the court of appeals inserted into the FSIA to deny immunity. International law defines genocide as a crime. Genocide Convention, art. I. And what it criminalizes is murder, bodily harm, and similar acts performed with the intent to cause the extermination of a national, ethnic, racial, or religious group. *Id.* art. II. If taking property can violate the law of genocide, it is not because property rights are invaded but because the invasion is done with criminal intent and is so severe that it puts at risk the survival of an entire people. It is strange to describe such acts as *takings* in violation of the international law of *genocide*. They are *acts of genocide* in violation of international law.

Stranger still, the court of appeals' approach cleaves the jurisdictional question from a plaintiff's substantive claims. Respondents do not assert causes of action for genocide. They bring common-law property claims for replevin, conversion, and the like. Joint.App.124–132. Proving these substantive claims

has nothing to do with whether the alleged takings were acts of genocide. As Judge Katsas observed below, the court of appeals' approach "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)." Pet.App.104. This is an odd way to interpret and apply an immunity exception addressed to invasions of property rights.

b. Other FSIA exceptions cast further doubt on reading this exception to reach violations of human rights. In similar statutory schemes, this Court has often used the existence or scope of one exception to clarify ambiguity in another. *See*, *e.g.*, *Dolan*, 546 U.S. at 489–90; *Maracich*, 570 U.S. at 67–68. The FSIA contains no explicit exception to immunity for foreign states' alleged violations of fundamental human rights, including genocide. Foreign states thus retain immunity for murder, torture, and serious physical injury committed with genocidal intent. *See*, *e.g.*, *Simon*, 812 F.3d at 141 (noting that the FSIA provides "no avenue by which to bring claims for personal injury or death" caused by genocide abroad). There is no reason to think that Congress meant to subject foreign states to suit in the United States for human-rights violations only when a plaintiff seeks compensation for the loss of property, but to leave them immune for genocide committed through murder or forced sterilization. If Congress intended to abrogate sovereign immunity for human-rights violations abroad, it would not have

addressed it as "exclusively a property offense." Pet.App.102 (Katsas, J., dissenting).

When Congress wished to address injuries to persons and violations of human rights, it did so directly. Three such FSIA exceptions exist. The noncommercial tort exception eliminates immunity for claims "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property." 28 U.S.C. § 1605(a)(5). Congress restricted that exception to injuries or death *in the United States*, among other limits. *Id.* Congress recently enacted a similar exception for acts of terrorism, again restricting it (among other things) to terrorism occurring in the United States. *Id.* § 1605B(b)(1). And Congress has abrogated immunity for personal injury or death occurring through state-sponsored terrorism. *Id.* § 1605A. While that exception applies to acts occurring abroad, it specifically defines the human-rights violations encompassed in the exception, *id.* § 1605A(a)(1), (h); applies only to designated defendants, *id.* § 1605A(a)(2)(A)(i); and is limited to claims brought by U.S. nationals, members of the armed forces, or U.S. government employees, *id.* § 1605A(a)(2)(A)(ii).

Because Congress has created explicit, narrow exceptions to immunity allowing claims for wrongs to persons—including certain human-rights violations—the language of the expropriation exception should not be read to create an implicit and unlimited exception to immunity for human-rights claims. *See Samantar*, 560 U.S. at 317–18 (finding that Congress's explicit mention of foreign officials in other provisions of the

FSIA counsels against reading foreign officials into the definition of "foreign state"). The court of appeals disturbed the "delicate balance" Congress struck in these exceptions by reading the expropriation exception to extend to areas that these explicit exceptions do not. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018).

c. The decision below wraps itself in the mantle of international law but itself is a major breach of that law. This Court has long held "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). This canon of interpretation is particularly apt for the FSIA, a statute directly concerned with international law. *See* 28 U.S.C. § 1602. Indeed, the text of the expropriation exception "emphasizes conformity with international law." *Helmerich*, 137 S. Ct. at 1320–21. Unsurprisingly, this Court has declined to read ambiguous provisions of the FSIA in ways that might cause the United States to violate its international obligations. *See*, *e.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060–61 (2019) (reading FSIA service provisions to avoid conflicting with Vienna Convention on Diplomatic Relations).

The customary international law of state immunity obliges nations to grant foreign states immunity in their domestic courts for sovereign acts. *See Jurisdictional Immunities of the State (Ger. v. Italy; Greece intervening)*, Judgment, 2012 I.C.J. 99, 123–24. That immunity does not evaporate when a sovereign is sued

for "serious violations of international human rights law or the international law of armed conflict." *Id.* at 139, 142. In *Jurisdictional Immunities of the State*, the ICJ found that Italian courts violated international law by denying Germany immunity from suits brought by Italian nationals for alleged violations of the laws of war and crimes against humanity committed by German forces in 1944 when occupying Italy. *Id.* at 113–14, 153–54. The decision below causes U.S. courts to violate customary international law in the same way. This Court should not, in the name of addressing "violation[s] of international law," needlessly interpret the expropriation exception in a manner that itself violates international law.

d. The decision below also conflicts with the FSIA's overall scheme. When a statutory exception departs from a statute's "general statement of policy," the exception should be "read narrowly in order to preserve the primary operation of the provision." *Maracich*, 570 U.S. at 60. After all, Congress does not "alter the fundamental details of an existing scheme with vague terms and subtle devices." *Hall*, 138 S. Ct. at 1129. Unless "commanded by the text," exceptions to a statutory scheme "ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design." *Maracich*, 570 U.S. at 60.

The FSIA declares Congress's intent to codify the customary international law of state immunity as it existed in 1976. 28 U.S.C. § 1602; *Samantar*, 560 U.S. at 313 (noting that purpose of the FSIA was "to endorse

and codify the restrictive theory of sovereign immunity"); Restatement Fourth § 454, cmt h. But the expropriation exception departs from the restrictive theory, because it denies states immunity for a sovereign act: expropriating property. *See Helmerich*, 137 S. Ct. at 1321. For this reason, no other nation recognizes a comparable exception. Restatement Fourth § 455, note 15.

Because the expropriation exception departs from the FSIA's general codification of the restrictive theory, it must be interpreted narrowly. *Maracich*, 570 U.S. at 60. *Helmerich* recognized as much, observing that the FSIA—the expropriation exception included—was not a "radical departure" from the principles of the restrictive theory. *Helmerich*, 137 S. Ct. at 1320.

The court of appeals has created a radical departure here. Left standing, the decision below invites a flood of suits against foreign states alleging that their sovereign actions within their own borders violated the human rights of their own nationals. Suits like this one, alleging that a foreign state expropriated the property of its own nationals in violation of the law of genocide, have already been brought against France and Hungary over alleged Nazi-era expropriations. *See*, *e.g.*, *Abelesz*, 692 F.3d 661 (Hungary); *Fischer*, 777 F.3d 847 (Hungary); *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-CV-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (France). The same theory has prompted suits over other historical events, such as claims against Turkey over allegedly genocidal takings of property from ethnic Armenians, *Bakalian*

v. Cent. Bank of Republic of Turk., 932 F.3d 1229 (9th Cir. 2019), and against Germany over alleged genocide in colonial Africa, *Rukoro v. Fed. Republic of Ger.*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019). The number of nations potentially subject to suit for alleged takings in violation of the law of genocide is substantial.

That is particularly so given the superficial way the court of appeals analyzed and applied the law of genocide below. The Genocide Convention prohibits specific acts performed with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Genocide Convention, art. II. Only one of these prohibited acts might include takings of property: The prohibition on "[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part." *Id.*, art. II(c). The Convention's drafters intended this provision to criminalize "measures of slow death," like "the deprivation of resources indispensable for survival, such as food, medication, proper housing, clothing and hygiene, as well as excessive work or physical exertion." Christian J. Tams, Lars Berster & Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* 121, 125 (2014) ("Tams"). Tribunals tasked with hearing claims of genocide have scrupulously analyzed whether charged acts meet this definition, and they have demanded proof the act was committed with the specific intent to cause the physical destruction of a protected group. *See*, *e.g.*, *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. &*

Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 121–23. Where these elements are not satisfied, tribunals have rejected claims that murder, physical violence, or serious mistreatment directed at protected groups constituted genocide, even when those acts occurred alongside undisputed genocidal acts. *See*, *e.g.*, *id.* at 176–90.

Respondents do not allege genocidal acts here. Instead, they allege that a Consortium of Jewish-owned art dealerships sold medieval artifacts stored in Amsterdam for less than market value in 1935. Joint.App.63–66, 75–78, 80–82, 92–98. The property at issue was not essential property, like food, medicine, or shelter, but an art collection. The Consortium was paid 4.25 million Reichsmarks, the equivalent of $1.7 million in 1935 dollars. Joint.App.182–88. And Prussia bought the collection not to cause anyone's death, but because the Welfenschatz was "historically, artistically and national-politically valuable" to Germany. Joint.App.81, 84–85.[10] Neither Respondents nor the court of appeals identified any decision of an international tribunal finding that a forced sale of *any* property, much less a sale like this one, constituted genocide. Had the court of appeals applied the actual law of genocide, it could not have concluded that the purchase of an art collection for $1.7 million was a "measure[] of slow death," Tams at 121, undertaken to cause the extinction of the Jewish people. Rather than analyzing whether the purchase of an art collection

[10] Indeed, the owners of the art dealerships in the Consortium emigrated from Germany before the start of the war, save for one who died in 1937 of natural causes. Joint.App.99–101.

met the legal definition of genocide, the court of appeals asked a much different question: whether the purchase related to the Nazi persecution of the Jews, which undisputedly began shortly after Hitler seized power. Pet.App.7–15. In doing so, it broadened the definition of genocide to include any discriminatory act against a protected group by a regime that committed genocide. Under that reading, any member of a group that has historically faced persecution or discrimination abroad could hale their home country into U.S. court, alleging that some property transaction with their state was an act of genocide.

Moreover, as Judge Katsas recognized, the court of appeals' rationale is not limited to violations of the law of genocide. Pet.App.108–109. Other human-rights norms regulate foreign states' treatment of their own nationals, including prohibitions on torture, other cruel, inhuman, or degrading treatment, and systematic racial discrimination. Restatement Third § 702. International law's prohibition against systematic racial discrimination alone will expose foreign states to countless U.S. suits based on domestic conduct, such as the claim that a state's exercise of eminent domain disproportionately targeted neighborhoods inhabited by a particular racial group or that systematic discrimination forced members of that group to sell their property to a state entity for less than its market value. And nothing in the court of appeals' interpretation limits the exception to violations of human-rights law, as opposed to international law more generally. Plaintiffs can thus force U.S. courts to decide such factually complex

and diplomatically fraught questions as whether a foreign state violated the international law of war by building settlements in disputed territory or blockading certain land (thereby depriving individuals within the state's jurisdiction of possession of their property). Courts will be forced to answer these highly political questions solely for *jurisdictional* purposes, so they can then decide garden-variety tort claims for conversion. It is hard to imagine a more "radical departure" from the principles of the restrictive theory than this.[11]

e. The court of appeals' expansive interpretation of the expropriation exception creates a grave risk that other nations will reciprocate, subjecting the United States to suits like this one in foreign courts. This Court has warned against interpreting the FSIA's expropriation exception in a manner that would be an "affront" to other nations, "producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States" in expensive suits abroad. *Helmerich*, 137 S. Ct. at 1322. Allowing U.S. courts to judge the propriety of foreign states' sovereign acts toward their own nationals in their own borders would be just such an "affront." As Judge Katsas observed, it

---

[11] If Congress intended such a drastic departure from the restrictive theory, it would have remarked on this when it enacted the FSIA. But the FSIA's legislative history contains no discussion about abrogating sovereign immunity for human-rights violations. *See* H.R. Rep. No. 94-1487 (1976); *see Samantar*, 560 U.S. at 319 n.12, 323 (recognizing that lack of any discussion of official immunity in FSIA legislative history suggested Congress did not intend FSIA to address that topic).

is not hard to imagine how the United States would react "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." Pet.App.109. In part to avoid the risks of such reciprocal treatment, the United States has urged this Court to reject the court of appeals' expansion of the expropriation exception. Brief of U.S. as Amicus Curiae at 7–14, *Fed. Republic of Ger. v. Philipp* (Sup. Ct.) (No. 19-351). Its position merits special deference, not only because of the Executive Branch's role in foreign relations, but also because of its involvement in drafting the FSIA. *Harrison*, 139 S. Ct. at 1060; *Jams v. Int'l Fin. Corp.*, 139 S. Ct. 759, 770–71 (2019).

f. The decision below also departs from general principles on U.S. courts' exercising jurisdiction over suits that do not concern the United States. Not unlike the expropriation exception, the Alien Tort Statute provides jurisdiction for "tort[s], . . committed in violation of the law of nations." 28 U.S.C. § 1350. This Court has warned against extending the ATS to reach claims against foreign governments for actions toward their own nationals abroad. *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). And it has held that this jurisdictional statute should not be interpreted to reach alleged wrongs against foreign nationals committed by foreign defendants abroad with no connection to the United States. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 114–17 (2013) (explaining that presumption against extraterritoriality applies to jurisdictional statutes such as ATS); *see also RJR Nabisco, Inc. v.*

European Community, 136 S. Ct. 2090, 2106–10 (2016) (holding that RICO cause of action did not apply to claims alleging injury outside the United States even though RICO's substantive provisions apply to foreign conduct). These principles fit the history and original meaning of the exception, which was primarily intended to address the domestic injuries caused by foreign states' nationalization of American-owned property without compensation. *See supra* Section I.C.2. Were the court of appeals' decision to stand, it would paradoxically be *easier* to obtain jurisdiction over foreign states for alleged human-rights abuses abroad than to obtain jurisdiction over private foreign defendants for the same acts.

g. Nothing in the FSIA's text, context, or history suggests that Congress intended U.S. courts to impose liability on foreign states for their alleged violations of the human rights of their own nationals in their own territory. Reading the property-focused expropriation exception to allow that result presumes that Congress hid an elephant in a mousehole. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress wished to let loose that elephant, it would have done so explicitly.

II. Respondents' claims should be dismissed based on international comity.

Respondents allege that a German Consortium owned by German nationals was forced to sell a collection of art to Germany for less than market value. They brought these same allegations to Germany's Advisory

Commission, a group of preeminent jurists, philosophers, and political leaders established to address such claims under the Washington Principles. When the Commission found the allegations lacked merit, Respondents did not pursue further remedies in Germany. Instead, they sued here, seeking replevin of a collection on display in German public museums for more than seventy years, or a quarter billion dollars in damages. Their asserted jurisdictional basis for those common-law claims requires U.S. courts to sit in judgment of the darkest chapter in Germany's history, while denigrating modern Germany's efforts to address and atone for those crimes.

Even if there were jurisdiction, this case should have been dismissed under principles of comity, which give courts discretion to abstain from adjudicating cases that risk international friction, pose serious concerns to a foreign sovereign, and have little connection to the United States. The court of appeals mistakenly held that Congress eliminated comity as a consideration in the FSIA. Comity-based abstention differs from jurisdiction. The FSIA does not address non-jurisdictional defenses, and its text gives no reason to think that Congress silently abrogated common-law defenses like comity.

The court of appeals should have recognized the ongoing importance of comity as an abstention doctrine and its applicability here. Modern Germany has a profound historical and political interest in resolving a challenge to the darkest chapter of its history and its present-day efforts to respond to that history. And U.S.

interests would be best served by letting Germany resolve these claims under the Washington Principles, an international framework spearheaded by the United States. This Court should remand with instructions to dismiss.

A. International comity allows courts to abstain from exercising jurisdiction over cases of grave concern to foreign sovereigns with minimal connection to the United States.

1. "[P]ermit[ting] 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." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918). This principle of comity

> is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having 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, 164–65 (1895).

Several related doctrines have sprung from this overarching principle of comity, including the act-of-state doctrine, the presumption against extraterritoriality, and forum non conveniens. *See*, *e.g.*, *Sabbatino*, 376 U.S. at 417 (act-of-state doctrine rests on "the highest considerations of international comity and expediency"); *RJR Nabisco*, 136 S. Ct. at 2100 (presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries"); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (courts should consider "risks to international comity" before assuming general jurisdiction over foreign corporations).

Lower courts have recognized international comity as a standalone basis for abstention when a case poses grave concern to foreign states and has minimal connection to the United States. *See*, *e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 597–615 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–40 (11th Cir. 2004); *see also Timberlane Lumber Co. v. Bank of Amer.*, 549 F.2d 597, 613–15 (9th Cir. 1976); *see generally* Samuel Estreicher & Thomas Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169, 178–79 (2020) (discussing evolution of doctrine). Courts have applied these principles in several types of cases, including those involving alleged human rights abuses, because "in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction." *Ungaro-Benages*, 379 F.3d at 1237 n.13. On this ground, the Seventh Circuit dismissed claims against Hungary

similar to those in *Simon*. *Fischer*, 777 F.3d at 857–59; *Abelesz*, 692 F.3d at 678–85.

2. These cases find support in the decisions of this Court. In *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), for example, the Court recognized that claims to assets of Philippine's former president Ferdinand Marcos "ar[o]se from events of historical and political significance for the [Philippines] and its people," which the Philippines had "a unique interest in resolving." *Id.* at 866. The Philippines' "[c]omity and dignity interests" supported treating the Philippines as an essential party, requiring dismissal of the case so that the matters in dispute could be decided by that nation's courts.

The Court has similarly invoked principles of comity (if not in those words) in the ATS context, to avoid "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 569 U.S. at 115; *see also Sosa*, 542 U.S. at 725 (cautioning courts to exercise a "restrained conception of the discretion . . . in considering a new cause of action" under the ATS); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (declining to recognize corporate liability under ATS in view of "serious separation-of-powers and foreign-relations concerns").

Kiobel is perhaps the best example. There, this Court invoked the comity-based presumption against extraterritoriality to conclude that the ATS does not provide jurisdiction over cases brought by foreign plaintiffs against foreign defendants involving conduct on foreign land (a "foreign-cubed" claim). 569 U.S. at

115–25; *see generally* Estreicher & Lee, 93 S. Cal. L. Rev. at 186–87. The concurring justices in *Kiobel* rejected the majority's reasoning but agreed that "[a]djudicating any such [foreign-cubed] claim *must . . . be consistent with those notions of comity* that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement." 569 U.S. at 128–29 (Breyer, J., concurring).

Several members of this Court have thus acknowledged that courts may abstain from hearing cases based on international comity. *See Jesner*, 138 S. Ct. at 1430–31 (Sotomayor, J., dissenting) ("Courts . . . can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department."); *Sosa*, 542 U.S. at 761 (Breyer, J., concurring) ("I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."); *Kiobel*, 569 U.S. at 127–40 (Breyer, J., concurring) (same).

B. The court of appeals erred by concluding that the FSIA displaced abstention based on international comity.

The court of appeals did not dispute that U.S. courts generally can abstain when a case offends international comity. But it concluded that the FSIA "leaves no room" for comity-based abstention when an FSIA

exception applies. Pet.App.20. In other words, courts can abstain to avoid offending a foreign nation—except when the foreign nation itself is being sued, and the offense is greatest. The decision misconstrued the FSIA and this Court's precedents.

1. The court of appeals' conclusion rested in large part on a conflation of the doctrines of international comity and sovereign immunity. While sovereign immunity grew out of international comity, *see generally Altmann*, 541 U.S. at 688–89, it serves a different purpose and addresses different concerns than comity-based abstention. Immunity exists because nations are "independent sovereign entities" that generally should not have to defend themselves in the courts of another sovereign. *Helmerich*, 137 S. Ct. at 1319–20. It applies only in suits brought against foreign states and their instrumentalities, 28 U.S.C. §§ 1603–04, and exists unless a statutory exception to immunity applies, *see* 28 U.S.C. §§ 1604–05. If none does, U.S. courts lack both personal and subject-matter jurisdiction. 28 U.S.C. § 1330. Sovereign immunity thus presents a jurisdictional bar to suits against sovereign defendants.

As Judge Katsas recognized below, "foreign sovereign immunity—which eliminates subject-matter jurisdiction—is distinct from non-jurisdictional defenses such as exhaustion and abstention." Pet.App.113; *see also Mujica*, 771 F.3d at 597–98. One key difference is that, unlike immunity, comity-based abstention does not turn on the *identity* of the defendant but on the *nature* of the suit. U.S. courts therefore can decline jurisdiction over a case of great concern to a foreign

sovereign, regardless of the identity of the parties. *See* Estreicher & Lee, 93 S. Cal. L. Rev. at 197–206. Even a private defendant can invoke the defense. *See*, *e.g.*, *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827–32 (9th Cir. 2008) (en banc); *Mujica*, 771 F.3d 580; *Ungaro-Benages*, 379 F.3d 1227.

In this respect, the doctrine resembles domestic comity-based abstention doctrines—such as *Burford* abstention, the *Colorado River* doctrine, or deference to tribal courts—which likewise turn on the nature of the suit and not the identity of the parties. *See*, *e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("[F]ederal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of proper constitutional adjudication, regard for federal–state relations, or wise judicial administration."); *cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16 & n.8 (1987) ("considerations of comity direct that tribal remedies be exhausted" before claims relating to tribal jurisdiction can proceed in federal court). No one would confuse those abstention doctrines with the sovereign immunity guaranteed, for example, under the Eleventh Amendment. And no one should confuse international comity-based abstention with foreign sovereign immunity.

2. Nothing in the FSIA's text or history displaces this comity-based abstention in suits against foreign sovereigns. On the contrary, the FSIA provides that

when a foreign state lacks immunity, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Courts have repeatedly recognized that Section 1606 requires courts to allow foreign sovereigns—not just private defendants—to invoke comity-based defenses like forum non conveniens. *E.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) (noting the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*"); *accord Simon*, 911 F.3d at 1181–82. Since private defendants can invoke comity-based abstention, *see*, *e.g.*, *Sarei*, 550 F.3d at 827–32; *Ungaro-Benages*, 379 F.3d 1227, sovereign defendants can also invoke it.

3. The court of appeals supported its conclusion that the FSIA eliminated comity-based abstention by relying on *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014). Pet.App.17–19. But its decision misconstrued that case. *NML Capital* held that a foreign sovereign that had waived immunity from certain suits was not immune from post-judgment discovery in aid of execution of the judgment. *Id.* at 136 n.1, 146. The Court explained that "any sort of *immunity* defense . . . must stand [or fall] on the [FSIA's] text," and the FSIA says nothing about states' immunity from post-judgment discovery. *Id.* at 141–42.

At the same time, however, the Court stressed that *non-immunity* comity-based defenses remain available to foreign sovereigns. It observed that there was "no reason to doubt" that the district court retained discretion to determine whether discovery was warranted

and could "appropriately consider comity interests" when exercising that discretion. *Id.* at 146 n.6. Far from supporting the court of appeals' decision, *NML* confirms that the court confused immunity (which the FSIA addresses) with comity-based abstention (which it does not).

That accords with earlier indications that comity-based abstention can be appropriate in FSIA cases. *See Altmann*, 541 U.S. at 700–01 (noting that suggestions of the United States to abstain from exercising jurisdiction may be entitled to deference); *id.* at 714 (Breyer, J., concurring) (recognizing potential for "other grounds for dismissal" in expropriation-exception cases, including that plaintiff "show an absence of remedies in the foreign country sufficient to compensate for any taking").

C. Principles of comity require abstention here.

This case highlights the importance of comity-based abstention in FSIA cases. Germany deserves the chance to address plaintiffs' claim—which not only allege domestic takings but challenge Germany's present-day efforts to respond to the most shameful era of its history—in its own domestic forums. The interests of the United States are also best served by abstention. Dismissal is warranted.

1. The subject matter of this case is profoundly important to Germany. Respondents ask U.S. courts to decide the ownership of the Welfenschatz, a collection

of historical German artifacts, created centuries ago, which "occupies a unique position in German history and culture." Joint.App.59–63. This collection has been almost continuously on public display in German state museums for over seventy years. Respondents want a U.S. court to order Germany to relinquish cultural property in Germany to parties residing outside of Germany. That would be a grave afront to comity.

2. Germany's interest in the alleged wrongdoing is even more important. Respondents ask a U.S. court to judge the propriety of Germany's actions within its own borders toward its own nationals. As this Court cautioned, federal courts should be reluctant "to consider suits under rules that would go so far as to claim 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." *Sosa*, 542 U.S. at 727. That is even more true when the case takes aim at the foreign sovereign itself.

Respondents' claims also implicate Germany's efforts over the past seventy-five years to address the most reprehensible period of its history and to provide redress to victims of that time. As the State Department has noted, Germany has "taken commendable steps to confront its role as the perpetrator of the Holocaust and to ensure that Holocaust victims and their heirs receive restitution and/or compensation." U.S. Dep't of State, The JUST Act Report: Germany (2020), *available at* www.state.gov/reports/just-act-report-to-congress/germany/. These steps include making "substantial financial contributions to victims'

funds and survivors' pensions," amounting to tens of billions of dollars "in restitution and compensation to Holocaust victims and their heirs." *Id.*

Germany's response to its Nazi past includes enormous efforts to locate and return Nazi-looted art to its rightful owners. As the State Department has observed, Germany "has returned 16,000 objects to survivors and their heirs over the last 20 years." *Id.* It signed the Washington Principles, an international agreement spearheaded by the United States, that is meant to "assist in resolving issues relating to Nazi-confiscated art." *See* U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles") (Dec. 3, 1998), *available at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. Those principles call upon countries to develop their own "national processes" for implementation, "recogniz[ing] that among participating nations there are differing legal systems and that countries act within the context of their own laws." *Id.*

Germany has done just that, establishing the Advisory Commission and endowing it with the authority to mediate claims between former owners of cultural property and German state museums. *See* Advisory Commission, www.lostart.de/Webs/EN/Kommission/Index.html (last visited September 1, 2020). That Commission conducted a hearing and reviewed extensive evidence and submissions, ultimately finding that "there is no indication in the case under consideration by the Advisory Commission that points to the art dealers

and their business partners having been pressured during negotiations." Advisory Commission, Recommendation concerning the Welfenschatz (Guelph Treasure) (March 20, 2014), *available at* https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/14-03-20-Recommendation-Advisory-Commission-Guelph-Treasure.pdf?__blob=publicationFile&v=7. The Commission did not "recommend the return of the Welfenschatz to the heirs of the four art dealers and any other previous co-owners." *Id.*

Respondents now seek to litigate the same issues in the United States, and their framing of this suit only amplifies the comity concerns. They challenge the integrity of the Advisory Commission and modern Germany's efforts to address its Nazi past, calling Germany's efforts a "sham" and "pretense." Joint.App.43–44. They accuse Germany of merely giving "lip service" to restitution, and accuse the "amateurish" Advisory Commission of rendering "politically motivated" and "meaningless" recommendations. Joint.App.115; Plaintiffs' Brief in Opposition to Motion to Stay at 5–6, *Philipp v. Fed. Republic of Ger.*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-266), ECF No. 31. They describe Germany's actions to address the Holocaust as "humiliat[ing]" and accuse its present government of being "latently anti-Semitic." Plaintiffs' Brief in Opposition to Motion to Dismiss at 41–44, *Philipp v. Fed. Republic of Ger.*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-266), ECF No. 19.

Ultimately, they challenge Germany's implementation of the Washington Principles as a "flawed and

self-serving" process, nothing but "a failed attempt to provide cover for Germany's failure to confront its legacy of looted art." Appellees' Opposition to 1292(b) Petition at 2-3, *Philipp v. Fed. Republic of Ger.*, No. 17-8002 (D.C. Cir. June 6, 2017). They claim that the supposed inadequacy of Germany's efforts to address the Nazi era provide an "additional justification" for U.S. courts to hear this case. Joint.App.43–44. Respondents do not simply wish to litigate the details of an art transaction eighty years ago. They ask U.S. courts to judge the propriety and adequacy of Germany's present-day institutions and the steps they took to address the sins of its Nazi past.

3. Respondents' failure to exhaust available remedies in Germany also supports abstention here. As Petitioners established below, Respondents could have brought civil claims for restitution of property obtained through duress or coercion and to seek damages for fraud or coercion. Pet.App.159–76. Respondents' own expert admitted that individuals seeking restitution for alleged Nazi art takings have recently brought civil claims in Germany and prevailed. *See* Pet.App.195–210. The availability of remedies like these counsels strongly in favor of abstention. *See*, *e.g.*, *Abelesz*, 692 F.3d at 678–85; *Fischer*, 777 F.3d 847.[12]

---

[12] Petitioners pledge again (as they did below) that if Respondents sue in Germany, they will not assert any statute of limitations defense in Germany. Because the statute of limitations is a waivable affirmative defense under German law, a suit filed by Respondents would not be subject to any statute of limitations. Pet.App.210–211.

4. Exercising jurisdiction would not serve U.S. interests. The only factual tie to the U.S. is that years after the 1935 sale of the Welfenschatz, some owners of the art dealerships or their heirs moved here, and that one defendant—SPK—has minimal commercial activities in the United States. Pet.App.16; Joint.App.53–58. That is all. As this Court has repeatedly advised, U.S. courts should be reluctant to assume jurisdiction over suits that do not "touch and concern" the United States. *Kiobel*, 569 U.S. at 124–25; *see also id.* at 139–40 (Breyer, J., concurring) (concluding that U.S. courts should not exercise jurisdiction over claims against foreign defendants brought by foreign plaintiffs over conduct abroad, when the only connection is a defendant's minimal commercial activities in the U.S.).

To the contrary, U.S. interests favor dismissal. As the Executive Branch explained, the United States has long encouraged foreign states to implement the Washington Principles and similar agreements about restitution of cultural property. Brief of U.S. as Amicus Curiae, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 135 S. Ct. 1158 (2015) (No. 09-1254) ("*Von Saher* SG Br."), 2011 WL 2134984, at *6–7, 16, 18–19. Those agreements task foreign states with the difficult role of deciding how to address Nazi-looted art claims on the merits, in accordance with their own legal traditions, preferably through alternative dispute resolution mechanisms. Washington Principles, Preamble and ¶¶ 8, 10–11. And when a foreign government "has afforded [claimants] adequate opportunity to

press their claims," the United States "has a substantial interest in respecting the outcome of that nation's proceedings." *Von Saher* SG Br. at *19; *see also* U.S.-Germany Joint Declaration Concerning the Implementation of the Washington Principles from 1998 at 2-3 (Nov. 26, 2018) ("Germany and the United States have worked to fully implement the Washington Principles . . . In the 20 years since the Washington Principles, Germany has returned over 16,000 individual objects to Holocaust survivors or their families."), *available at* https://www.lootedart.com/web_images/pdf2018/2018-11-26-gemeinsame-erklaerung-washingtoner-prinzipien-engl-data.pdf. These interests suffer if U.S. courts can second-guess foreign states' restitution efforts in individual cases. And they would be fatally impaired if U.S. courts assumed the authority to judge the adequacy of foreign nations' efforts to fulfill their commitments under the Washington Principles.

5. Because Germany has a unique and compelling interest in resolving these claims, and United States policy supports resolution of such claims in Germany, considerations of international comity warrant abstention and dismissal of this case.

CONCLUSION

The Court should vacate the judgment of the court of appeals and remand with instructions to dismiss based on sovereign immunity or, alternatively, comity.

Respectfully submitted,

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

JONATHAN M. FREIMAN
Counsel of Record
TADHG DOOLEY
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

Counsel for Petitioners