No. 19-351

In the

Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL.,
Petitioners,

v.

ALAN PHILIPP, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AND SEVEN NATIONAL ORTHODOX JEWISH ORGANIZATIONS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") has spoken on behalf of America's Orthodox Jewish community for more than half a century. COLPA's first amicus brief in this Court was filed in 1967 in *Board of Education v. Allen*, 392 U.S. 236 (1968). Since that time, COLPA has filed more than 40 amicus briefs to convey to this Court the position of leading organizations representing Orthodox Jews in the United States. The following national Orthodox Jewish organizations join this amicus brief:

▪Agudas Harabbonim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

▪Coalition for Jewish Values ("CJV") is a national rabbinic public policy organization that represents more than 1,500 traditional Orthodox rabbis and advocates for classical Jewish ideas and standards in matters of American public policy.

▪National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in

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[1] Pursuant to Supreme Court Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part. No person or party other than the amici has made a monetary contribution to this brief's preparation or submission. The parties have filed blanket consents.

matters of social and legal significance to the Orthodox Jewish community.

▪Orthodox Jewish Chamber of Commerce is a global umbrella of businesses of all sizes, bridging the highest echelons of the business and governmental worlds together stimulating economic opportunity and positively affecting public policy of governments around the world.

▪Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 950 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

▪Rabbinical Council of America ("RCA") is the largest Orthodox Jewish rabbinic membership organization in the United States comprised of nearly one thousand rabbis throughout the United States and other countries. The RCA supports the work of its member rabbis and serves as a voice for rabbinic and Jewish interests in the larger community.

▪Torah Umesorah (National Society for Hebrew Day Schools) serves as the preeminent support system for Jewish Day Schools and yeshivas in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivas with a total student enrollment of over 190,000.

INTRODUCTION

Germany proudly exhibits a collection of medieval ecclesiastical art called the *Welfenschatz* as a "national cultural treasure" in the Bode Museum in Berlin. In describing its exhibit the German government fails to disclose how Germany came to own this priceless collection. It does not even hint that its 1935 purchase from Jewish owners residing in Frankfurt was managed by Herman Goering, Nazi Germany's second most powerful government official, so that the treasure could be given as a surprise gift to Adolf Hitler.

Supported surprisingly by our own State and Justice Departments, Germany has brought this case to this Court to have the Supreme Court of the United States confirm that Germany did not violate the law of nations when it coerced Jews (three of whom would soon flee from Germany) to surrender ownership of the *Welfenschatz* for a purchase price that was less than one-third its true value. In an astounding demonstration of gross insensitivity and arrogance, Germany claims that the 1935 purchase was a "domestic taking" by Germany of its "own national's property within its own borders." Brief for Petitioners 9.

Page 18 of Germany's brief cites this Court's explanation of why "domestic takings" are, in ordinary circumstances, not deemed to be violations of international law. This Court said in *United States v. Belmont*, 301 U.S. 324, 332 (1937), that if citizens' property is expropriated by their government, "[s]uch nationals must look to their own government for any redress to which they may be entitled." Germany never

suggests how Jewish residents of Frankfurt whose valuable property was extorted from them in June 1935 via a devious scheme orchestrated by Goering could have obtained "redress to which they [were] . . . entitled" from Hitler's Nazi government.

We need not describe in detail for this Court how Jews were treated by German law in 1935. That task has been performed admirably in the Brief of *Amici Curiae* Holocaust and Nuremberg Historians filed in this case on September 10, 2020.

Germany's conduct in retaining ownership of the *Welfenschatz* and in defending its Nazi expropriation as valid under the law of nations brings to mind the biblical condemnation uttered by Elijah the Prophet to King Ahab after Queen Jezebel had Naboth executed so that Ahab could take possession of Naboth's treasured vineyard. (Kings I, 21:19). The tone and cadence of Elijah's denunciation in Hebrew cannot be conveyed in translation so we quote it in its original and in English:

הרצחת וגם ירשת?

"Have you murdered and also inherited?"

Elijah's remonstrance applies, we submit, to Germany.

SUMMARY OF ARGUMENT

This *amicus* brief focuses on three points:

First, the Court should not now address (1) the contention of Germany and the Solicitor General that the law of nations is not violated if "a sovereign has

expropriated the property of its own nationals" and (2) whether the taking was tantamount to an act of genocide. Nor need it now address the availability of the doctrine of international comity – the second of Germany's Questions Presented.

We urge the Court to consider an alternate ground to reject Germany's "domestic takings" defense that was not argued below. We submit that the "domestic takings" proposition applies ***only*** if those whose property has been expropriated are truly nationals or citizens of the expropriating sovereign. If the sovereign does not grant individuals whose property has been taken the same right under law as other citizens to obtain "redress to which they may be entitled," such individuals are not "nationals" within the ambit of the "domestic takings" principle of international law.

Indisputable historical facts are set forth in the *amicus* brief of the Holocaust and Nuremberg Historians. That history proves that Jews were no longer truly "nationals" of Germany as early as 1933, and surely not by June 1935. The September 1935 Nuremberg Laws merely codified the existing situation in Nazi Germany.

Second, we challenge the assertion made at page 19 and footnote 7 of Germany's brief that the plaintiffs in the district court "forfeited" any argument that the owners of the *Welfenschatz* were no longer German nationals by June 1935.

Third, in light of undisputed historical evidence of the status of Jewish residents of Germany in 1935, this Court should take judicial notice that the owners of the

Welfenschatz were, because of their Jewish identity, no longer "nationals" or "citizens" of Germany within the meaning of the "domestic takings" principle of international law. Such finding by this Court would result in denial of Germany's motion to dismiss without resolving the legal issue that Germany and the Solicitor General have laboriously argued.

ARGUMENT

I.

GERMANY'S COERCED PURCHASE WAS NOT A "DOMESTIC TAKING" BECAUSE THE SELLERS DID NOT, AT THE TIME OF THE PURCHASE, HAVE THE SAME RIGHTS TO REDRESS UNDER GERMAN LAW AS ALL OTHER GERMAN NATIONALS

Germany claims that the Jews who sold the *Welfenschatz* in June 1935 were, at that time, German "nationals" or "citizens." To be sure, Germany did not formally strip its Jews of their German citizenship until September – three months after the treasure's owners acceded to the terms of the "sale." The First Ordinance to the "Reich Citizenship Law" was issued on November 14, 1935, and it declared in Article 4(1) that "A Jew cannot be a Reich citizen."

Does it follow that until Germany made a formal declaration cancelling the German nationality of all its Jews, they were, for international-law purposes, "nationals" of the German Reich? That conclusion contradicts the accepted definition of nationality and citizenship, as well as undisputed and indisputable history.

Black's *Law Dictionary* and *TheLaw.com Law Dictionary* define "citizen" as follows: "A member of a free city or rural society ***possessing all the rights and privileges which can be enjoyed by any person under its constitution and government***, and subject to the corresponding duties." (Emphasis added.) A person who does not have "all" rights and privileges of citizenship is not, by definition, a "citizen."

The *amicus* brief filed by the Holocaust and Nuremberg Historians amply establishes that long before June 1935 Germany's Jews were deprived of rights enjoyed by other German citizens. From the time of Hitler's appointment as Chancellor on January 30, 1933, German Jews "were viewed and treated increasingly as aliens and strangers in their own land." *Amicus* Brief 4. They were "systematically stripped of legal and economic rights normally associated with citizenship" and subjected to "a creeping curtailment of legal and property rights." *Ibid.* Pages 10-25 of the a*micus* brief detail the indisputable historical facts supporting these conclusions.

Jews did not, in June 1935, have the right or ability that non-Jewish Germans had at that time to obtain from the government of the Third Reich "redress to which they may be entitled." Consequently, the justification articulated in *United States v. Belmont*, 301 U.S. 324, 332 (1937), for denying international-law liability for "domestic takings" does not apply to the Nazi government's taking in June 1935 of Jewish-owned property such as the *Welfenschatz*.

The dictionary definition of "citizen" controls this case, just as dictionary definitions of statutory

language led this Court to its recent unanimous decision in *Intel Corp. Inv. Policy Committee v. Sulyma*, 140 S. Ct. 768, 776 (2020). When Goering arranged to "purchase" the *Welfenschatz* in June 1935 he was not doing business with German "nationals" who could, if justified, seek "redress" from their own government.

II.

THE PLAINTIFF-RESPONDENTS DID NOT "FORFEIT" THE CLAIM THAT THE OWNERS OF THE *WELFENSCHATZ* WERE NO LONGER GERMAN CITIZENS WHEN THEIR PROPERTY WAS TAKEN

Germany asserts at page 19 of its brief that the issue it has brought to this Court – whether property Germany took "from its own national" is a violation of international law – is dispositive of this case because, it says, the "individuals who owned these art dealerships were German nationals." In footnote 7 the brief claims that the plaintiff-respondents have "forfeited" the "novel argument" that the owners of the *Welfenschatz* in June 1935 were no longer "German nationals."

None of the record citations specified in Germany's brief supports the brief's assertion that this legal argument – which we make in our *amicus* brief regardless of the legal contentions made by the plaintiff-respondents – has been "forfeited" by the plaintiffs or waived in any way.

(1) Joint App. 43 (Complaint ¶1) describes the owners of the *Welfenschatz* as "three art dealer

firms in Frankfurt." It does not acknowledge or imply that the firms were German nationals.

(2) Joint App. 48 (Complaint ¶¶17, 18, 19) describes the individual plaintiffs (two of whom are United States citizens) as the sole legal successors to the individuals who owned the dealer firms – Zacharias Max Hackenbroch, Isaak Rosenbaum, and Saemy Rosenberg. There is no acknowledgement or implication that these owners were German nationals.

(3) Joint App. 63 (Complaint ¶34) describes the Consortium that owned the *Welfenschatz*. It contains no acknowledgement or implication that the Consortium or its constituent members were German nationals.

(4) Joint App. 89-90 (Complaint ¶¶128-130) describe the flight from Germany of the *Welfenschatz*'s owners. There is no acknowledgement or implication that they were, at the time of the transaction, German nationals.

(5) Joint App. 99-101 (Complaint ¶¶163-176) describe the reportedly violent death of Hackenbroch and the flight and emigration of Goldschmidt, Rosenberg, and Rosenbaum. No allegation acknowledges or implies that any of them was a German national in June 1935.

(6) Joint App. 216-217 (Expert Opinion of Dr. Christian Armbruster ¶¶14-17) says that it "seems correct to assume that all the three firms were German entities." This is not an

> acknowledgement or implication ***by the plaintiffs*** that the firms were, as of June 1935, German nationals. It is the opinion of Germany's retained expert.

Whether the owners of the *Welfenschatz* were or were not German nationals in June 1935 when the Nazi government took their property was not resolved by the initial pleadings. At that juncture, Germany took an interlocutory appeal from a decision in the district court that accepted *arguendo* Germany's assertion that the owners had citizenship status when their property was taken. Germany argued that it was immune as a matter of law because it obtained ownership by a "domestic taking." The plaintiffs properly defended the district court's legal conclusion and had no duty, at this early stage of the litigation, to respond with a factual defense that was an alternative ground on which they could prevail – *i.e.*, that the owners had effectively been deprived of German nationality before June 1935.

This case is, therefore, not controlled by *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-398 (2015), on which Germany relies. In the *OBB* case a district court ruled in the defendant's favor and dismissed the complaint. A panel of the court of appeals affirmed the dismissal. The case was then argued a third time before the en banc Ninth Circuit, which vacated the dismissal. This Court rejected the Ninth Circuit's holding, and the plaintiff, in addition to defending the decision of the district court and the panel of the court of appeals, asserted a legal theory that she raised for the first time in this Court. Under these circumstances, this Court ruled that an

"argument [that] was never presented to any lower court" was "forfeited."

In *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), on which the *OBB* decision relied, the history of the litigation was even more compelling. A trustee in bankruptcy prevailed in bankruptcy court and in the district court, but lost in the court of appeals. His petition for certiorari failed to raise a legal contention based on a statutory provision on which he had not relied in any lower court. This Court ruled that "the integrity of the process of certiorari" foreclosed consideration of his new claim. 503 U.S. at 646.

III.

THIS COURT SHOULD TAKE JUDICIAL NOTICE OF UNDISPUTED HISTORICAL FACTS AND AFFIRM THE JUDGMENT OF THE DISTRICT COURT WITHOUT DECIDING THE QUESTION PRESENTED IN GERMANY'S PETITION FOR CERTIORARI

This Court takes judicial notice of facts that are "generally known" and can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 201(b) of the Federal Rules of Evidence; *see* Shapiro, Geller, Bishop, Hartnett & Himmelfarb, *Supreme Court Practice* 743-745 (10th ed. 2013).

In accepting the "Brandeis Brief" in *Muller v. Oregon*, 208 U.S. 412, 421 (1908), this Court said, "We take judicial cognizance of all matters of general knowledge." In *New York Indians v. United States*, 170 U.S. 1, 32 (1898), this Court articulated the following

principle regarding judicial notice: "While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records, or public documents which were not called to its attention, or other similar matters of judicial cognizance." And in *Brown v. Piper*, 91 U.S. 37, 42 (1875), the Court observed, "Facts of universal notoriety need not be proved."

Applying this principle, this Court can and should take judicial notice of the indisputable historical fact that by the beginning of 1935 Jewish nationals residing in Germany no longer had the rights of non-Jewish German citizens. This Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), and the opinion written by then-Circuit Judge Sotomayor in *United States v. Reimer*, 356 F.3d 456 (2d Cir. 2004), illustrate judicial cognizance of the historically unique persecution of Jews by the Nazis.

This indisputable fact resolves this Court's disposition of this case. Once one acknowledges that Jews residing in Frankfurt in June 1935 were not citizens of Germany because, unlike non-Jewish citizens, Jews were legally unable to obtain "redress" for governmental takings of their property, the decision of the district court, affirmed by the court of appeals, should be affirmed regardless of the resolution of the legal issue presented by the petition for certiorari and argued in the briefs of Germany and the Solicitor General. The case can then be remanded for discovery and further proceedings.

CONCLUSION

For the reasons in this *amicus* brief, corroborated by the *amicus* brief of the Holocaust and Nuremberg Historians, the judgment of the district court should be affirmed and the case remanded for further proceedings without resolution of the first issue presented in the petition for a writ of certiorari.

Respectfully submitted,

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