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 *AMICUS CURIAE* FOR THE HOLOCAUST ART RESTITUTION PROJECT, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, the Holocaust Art Restitution Project, Inc. ("HARP") respectfully submits this *amicus curiae* brief in support of Respondents Alan Philipp, Gerald G. Stiebel, and Jed R. Leiber.

HARP was founded in 1997 as a not-for-profit organization with the mission to research and document Jewish cultural losses at the hands of the Nazis between 1933 and 1945, to document the patterns of spoliations, the dispersals of Jewish art collections, and to plot out their ultimate fate in the post-war world based on solid, scholarly, and empirical archival research and analysis of primary source documents in American and European public and private archives. Another one of HARP's goals is to raise public awareness about the magnitude of the thefts that plagued the Jewish communities of Europe and the threat that the inability and unwillingness to recover these stolen items poses to the modern art market and to present current possessors of possibly stolen goods, which had been misappropriated within the framework of a genocidal enterprise. HARP has made a number of landmark accomplishments in its field, including halting

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

the Sotheby's sale of a looted painting by Jacob van Ruysdael and advocating for the return of two paintings by Egon Schiele from the Museum of Modern Art to its rightful owners. HARP has adopted an assertive tone regarding advocacy on behalf of claimants to facilitate restitution policies and processes in the U.S., and it is because of this advocacy and expertise that HARP submits this brief as additional information to aid the Court in its consideration of the future of 28 U.S.C. §1605(a)(3), otherwise known as the "expropriation exception" to the Foreign Sovereign Immunities Act ("FSIA").

SUMMARY OF ARGUMENT

The FSIA was passed in 1976 to establish when a foreign state can be subject to litigation in the United States. The default rule is that such sovereigns are immune, but general exceptions apply. 28 U.S.C. § 1605(a)(3), the so-called "expropriation exception," provides that a foreign state shall not be immune from the jurisdiction of U.S. courts "in which rights in property taken in violation of international law are in issue. . . ." 28 U.S.C. § 1605(a)(3). Though this is the extent of the qualifications made by the language of the statute, many issues have arisen in its interpretation. One is the attempted addition of certain exclusions, which are not present in the text of the statute, but are nonetheless at the heart of the issues before this Court.

This case now comes before this Court to clarify the expropriation exception's applicability involving the alleged forced sale of the Guelph Treasure, a collection of medieval relics, between the Jewish art dealers who owned it and Nazi Germany in 1935. After heirs to the Jewish art dealers filed suit in the United States, the D.C. Court of Appeals held that the expropriation exception applied in this case, and therefore U.S. courts had jurisdiction over Germany. Though two separate questions have been certified before this Court, this brief focuses on the first question: Whether the expropriation exception of the FSIA can provide jurisdiction over claims that a foreign sovereign has violated international law when taking property from its own nationals, when the taking amounted to genocide. HARP supports that the answer is unequivocally yes.

First, the D.C. Court of Appeals correctly held that the expropriation exception should confer jurisdiction of U.S. courts over a foreign sovereign in this case. This forced sale, perpetrated in 1935, is within the Nazi-era of Germany and amounted to a commission of genocide, and because genocide violates international law, this qualifies as "property taken in violation of international law." *Simon v. Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016). Indeed, there is a plethora of case law and scholarship concluding that genocide is, without a doubt, a violation of international law. Further, the text of the FSIA itself confirms that Nazi-era claims involve those "in which rights in

property taken in violation of international law are in issue," thus confirming the holding in *Simon*. 28 U.S.C. § 1605(h)(2)(A).

Second, the legislative branch has already clearly spoken on this issue several times, finding that the Nazis confiscated hundreds of thousands of works of art as part of their "genocidal campaign against Jewish people." Pub. L. No. 114-308, 130 Stat. 1524, § 2(1) (2016).

Third, contrary to the explicit position consistently expressed by Congress, Petitioners incorrectly contend that no jurisdiction exists in this case. To bolster their argument, they rely on a misquote from the concurrence from *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) to assert a so-called "consensus view" regarding an unwritten exception to the rule, arguing, without any basis, that it cannot apply to *any* state's taking of property from its own nationals. In an attempt to legitimize their position, Petitioners and the Solicitor General as *amicus curiae* manipulate the language of the expropriation exception, misconstrue the meaning of the House Report accompanying the FSIA, and leave out essential portions of the Restatement of Foreign Relations Law of the United States, when it is clear that all of these sources actually support the opposite argument.

Fourth, this Court has already declined to adopt Petitioners' argument that domestic takings can *never* be a violation of international law, when, in *Bolivarian*

Republic of Venezuela v. Helmerich Payne, it stated that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." 137 S.Ct. 1312, 1321 (2017).

Fifth, Petitioners' interpretation of the expropriation exception would divide Holocaust survivors into categories based on the classification of citizenship at the time of the expropriation, which was irrelevant to the Nazi regime's ultimate goal of extermination. It did not matter to the Nazis what ultimate category any given individual fell into, but rather that he or she was Jewish. As Jews living in Nazi Germany, they were systematically discriminated against and subject to the expropriation of their art collections and other property. Further, Petitioners' position would create inequitable availability to bring suit in U.S. courts, which violates the "fundamental constitutional right of access to the courts" based on prior citizenship of United States citizens, or ancestral citizenship of those who seek adjudication. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

Finally, overturning the D.C. Court of Appeals decision below would directly contradict the policy of multiple Congressional Acts, as well as the Executive Branch's position on Holocaust-era restitution policy since 1998. The Holocaust Victims Redress Act ("HVRA") and Holocaust Expropriated Art Recovery

Act ("HEAR Act") make it easier for victims and heirs to bring claims for restitution in the United States. Pub. L. No. 105-158, 112 Stat. 15 (1998), Pub. L. No. 114-308, 130 Stat. 1524 (2016). The current Congress and Executive Branch have continued to support this position with the Justice for Uncompensated Survivors Today Act ("JUST Act"), which enacted legislation to carry out the goals of the Terezin Declaration of 2009. Pub. L. No. 115-171 (2018). A ruling in favor of Petitioners will create an inequitable procedural bar on certain restitution cases based on the initial citizenship of the claimant, while it is the explicit goal of Congress and the Executive Branch to make it easier, not harder, for those who seek restitution for Holocaust-era expropriations to have their day in court. In fact, all three branches of the federal government have made it clear that the United States believes that justice for these atrocities ought to be attained. A reversal of the D.C. Court of Appeals will not only place a significant bar on any Jewish Holocaust survivor or their heirs to bring a restitution claim in the United States, but it will end up rewriting the history of the persecution of Jews in Germany and everywhere in Europe.

ARGUMENT

I. THE D.C. COURT OF APPEALS CORRECTLY DECIDED THAT THE EXPROPRIATION EXCEPTION CONFERS JURISDICTION OVER THE PETITIONERS IN THIS CASE.

A. Reliance on the *Simon v. Republic of Hungary* precedent was correct because it accurately demonstrated the scope of the expropriation exception.

Philipp v. Germany was not the first case before the D.C. Court of Appeals involving FSIA's expropriation exception in Holocaust-era cases. The court based its finding that the expropriation exception conferred jurisdiction over the Petitioners on the reasoning expressed in *Simon v. Republic of Hungary. Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018).

Simon was correctly decided, and the legal analysis the court followed was adopted in *Philipp v. Germany*. The reasoning behind the D.C. Court of Appeals in *Simon* is a very simple and textual application of the statute: the forced sale or taking amounted to the commission of genocide, and genocide violates international law; therefore, the forced sale or taking was in violation of international law, and pursuant to the expropriation exception, the court had jurisdiction. *Simon*, 812 F.3d at 142.

Addressing the conclusion that the expropriation amounted to genocide, the D.C. Court of Appeals first defined the term genocide adopted by the Convention

on Prevention of the Crime of Genocide: "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . . (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. Further, the court elaborated that "the Genocide Convention's history indicates that paragraph (c) aimed *precisely* to capture the practice of expropriation and ghettoization in the holocaust." *Simon*, 812 F.3d at 143 (emphasis added). Therefore, the court correctly concluded that "[e]xpropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide." *Id.*

Beyond the *Simon* decision, there is overwhelming independent evidence to support the conclusion that these expropriations were a key component of a genocidal policy orchestrated by the Nazi regime. Raphael Lemkin was a Polish Jewish lawyer who coined the term "genocide" in 1944 and worked with the United Nations for the adoption the Genocide Convention's treaty, from which the international and United States definition of genocide originates. Lemkin, who served on the staff of the U.S. Chief of Counsel for Prosecution of Criminality at the Nuremburg trials, understood that genocide is a complex crime, and advocated that all elements that make up the systematic destruction of an entire group of people are all equally criminal.

Lemkin recognized that "[w]hoever, while participating in a conspiracy to destroy a national, racial or religious group, undertakes an attack against life, liberty or *property* of members of such groups is guilty of the crime of genocide." Raphael Lemkin, *Genocide*, Vol. 15, No. 2 *American Scholar* 227, 230 (1946) (emphasis added). Further, Lemkin explained that there were different techniques employed by the perpetrators of genocide, saying "[t]he genocidal purpose of destroying or degrading the economic foundations of national groups was to lower the standards of living and to sharpen the struggle for existence, that no energies might remain for a cultural or national life. *Jews were immediately deprived of elemental means of existence by expropriation* and forbidding them the right to work." Raphael Lemkin, *Genocide – A Modern Crime*, Vol. 9, No. 4 *FREE WORLD* (New York) 39-43 (1945) (emphasis added).

Moreover, Congress continually and consistently maintained that expropriations that took place during the Holocaust amount to commissions of genocide. In the Holocaust Victims Redress Act, Congress found that the "Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage." Pub. L. No. 105-158, 112 Stat. 15 § 201(4) (1998). Again, in the HEAR Act, Congress found that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other

persecuted groups." Pub. L. No. 114-308, 130 Stat. 1524, § 2(1) (2016). Congress described the looting as "critical" to the genocidal campaign in the Holocaust Victims Redress Act. By affirming that finding twenty years later in the HEAR Act, Congress showed that it never deviated from this view. Therefore, it has consistently asserted that expropriations and looting amount to the commission of genocide. The D.C. Circuit's decision in *Simon* perfectly reflects Congress's consistent legislative findings and views.

The second step in the D.C. Court of Appeals' analysis in *Simon* is that genocide violates international law. Indeed, the definition of genocide cited above from the Genocide Convention is "generally accepted for purposes of customary [international] law." Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. d (1987). As the D.C. Court of Appeals notes in *Simon*, there are a plethora of other international treaties to reinforce this fact. *Simon*, 812 F.3d at 143.

Finally, the D.C. Court of Appeals addressed the so-called "domestic takings" rule, whereby a sovereign's expropriation of its own national's property is not ordinarily a concern of international law. The D.C. Court of Appeals correctly pointed out that the circumstances around expropriations constituting commissions of genocide are anything but ordinary, and that "[g]enocide perpetrated by a state against its own nations *of course* is a violation of international law." *Id.* at 145 (citing generally Genocide Convention art. 2) (emphasis added). This analysis led the D.C. Court of Appeals

in *Simon* to correctly hold that immunity was defeated under the expropriation exception. The same reasoning led that court to hold that there was jurisdiction over the Petitioners in *Philipp v. Germany* below, which was correctly decided. All of the aforementioned evidence proves that the expropriation by the Nazis from Jewish people that took place during the Holocaust amounted to commissions of genocide. Because genocide violates international law, the property was taken in violation of international law in the way the expropriation exception meant to confer jurisdiction upon a foreign sovereign. The present case is no different, and the D.C. Court of Appeals decision in *Philipp v. Germany* correctly followed that precedent.

B. The *Simon* decision is consistent with Congress's position when it passed the "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act" in 2016.

As the court in *Simon* made clear, genocide, specifically the Holocaust, is a violation of international law. When property is taken in violation of international law, jurisdictional immunity provided to foreign sovereigns should fall. The *Simon* decision is completely consistent with the 2016 passage of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 11618 (2016). This statute delineates a special exception that immunity from suits for certain art exhibition activities does not apply when property was taken in violation of

international law, during the period beginning January 30, 1933 and ending May 8, 1945. 28 U.S.C. § 1605(h)(2)(A)-(3)(C). In writing this provision, Congress recognized again that Nazi looted art claims are ones involving property taken in violation of international law. Further, this statute confirms that Congress expressly recognizes these claims arise out of the period between January 30, 1933 and May 8, 1945, which includes June of 1935, when the forced sale perpetrated by the Nazis in the case at hand took place. Therefore, within the text of the FSIA itself lies Congress's explicit goal that claims such as the one at hand fall within the meaning of the expropriation exception. A reversal of the D.C. Court of Appeals' conclusion that this case involves a Nazi-era claim of property taken in violation of international law will contradict the explicit language of the FSIA.

II. PETITIONERS AND THE SOLICITOR GENERAL ARE INCORRECT IN ASSERTING THAT THE EXPROPRIATION EXCEPTION DOES NOT APPLY BECAUSE THEIR EVIDENCE SUPPORTS THE OPPOSITE RESULT.

A. Contrary to Petitioners' and the Solicitor General's contention, there is no "consensus view" regarding the expropriation exception.

Petitioners and the United States Solicitor General remain adamant that a sovereign's taking from its own nationals, even if the takings were an integral

part of the atrocities of the Holocaust, cannot confer jurisdiction over foreign sovereigns in U.S. courts. Both argue that a so-called "consensus view" exists and that a "violation of international law" for purposes of the expropriation exception cannot mean expropriations of property owned by a county's own nationals. Furthermore, both Petitioners and their *Amicus* claim that this "consensus view" is recognized by members of this Court, referring to Justice Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004). Yet Justice Breyer made no such recognition in his concurrence. Rather, regarding the expropriation exception, Justice Breyer wrote: "*if* the lower courts are correct in their consensus view that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a county's own nationals. . . ." *Id.* (emphasis added). The term "if" conditions the validity of one thing on another; it does not confirm such thing to be true. "if." Merriam-Webster Online Dictionary. 2020. http://www.merriam-webster.com (20 Oct. 2020). Justice Breyer did not agree or disagree with any view, he rather declined to recognize whether such consensus even existed. It is a distortion of Justice Breyer's words to say that members of this Court recognize the "consensus view" that Petitioners and the Solicitor General attempt to push, and it is therefore incorrect.

B. Petitioners' and the Solicitor General's position is not supported by the record they present.

Petitioners and the Solicitor General attempt to push their position further by advocating a "natural reading" of the expropriation exception. Yet, their adopted reading falls far short from any version of a "natural reading." The Petitioners assert that the expropriation exception should be read to "abrogate sovereign immunity for takings that violate that defined body of international law, not a taking that violates *any* principle of international law." Petition for Writ of Certiorari, at 18. Instead of adding words such as the Petitioners did, the Solicitor General decided instead to rearrange the words to better suit their position, advocating that, to adhere to the text, "a court may only exercise jurisdiction under the expropriation exception when it is satisfied that a claim involves an alleged 'violation' of the principles of 'international law' governing when 'property' is unlawfully 'taken.'" *Amicus* Brief at 7. A "natural reading" of the text does not necessitate the addition of qualifying words such as "that defined body" or "any." As this Court has said, "it must ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Nor should one be allowed to rearrange the words of the statute to take on new meaning, for, if Congress wanted the words in that order, it surely would have written them that way. The manipulation of the expropriation exception by the Petitioners and Solicitor General is a baseless

interpretation, rearranging or reading in qualifying language that do not appear in the plain text of the statute.

The 1976 House Report accompanying the FSIA further supports that the textual reading of the statute makes no such qualifications. As to the expropriation exception, the House Report explains that "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. 1487, 94th Cong., 2d Sess. 19-20 (1976). From the alleged facts regarding the forced sale of the Guelph Treasure, those requirements are more than satisfied. On the basis of the allegations, the property was expropriated without adequate or effective payment, and obviously the taking of Jewish property by the Nazis during the Holocaust was discriminatory. However, the Solicitor General, in an attempt to overlook the obvious applicability of the language from the House Report to the facts of this case, added: "as when a state targets the property of foreign nationals while leaving the property of its own citizens undisturbed." *Amicus* Brief at 8. Though that is one example of a violation of international law, there are certainly others, such as the commission of genocide.

More importantly, the House Report itself does not even specify whether the takings in question must have happened to a nation's own citizens or another's

citizens, nor does it clarify that only certain violations of international law would be sufficient to confer jurisdiction over a sovereign. Again, it seems remarkably clear that, if Congress wanted to limit the scope of the expropriation exception in the way Petitioners and the Solicitor General desire, it would have done so, either in the text of the statute itself, or, at the very least, in the House Report accompanying the FSIA. Indeed, the D.C. Court of Appeals in *Simon*, recognizing the obvious, noted that "in the absence of any indication that Congress would have desired to exclude genocidal takings from the statute's scope, and in light of the established status of genocide as an international-law crime by the time of the FSIA's enactment, we adhere to the expropriation exception's *plain terms* in holding that genocidal expropriations constitute 'tak[ings] in violation of international law.'" *Simon*, 812 F.3d at 146 (emphasis added). The intent of Congress is clear in both the language of the statute itself and the accompanying House Report. Try as the Petitioners and the Solicitor General might, it does not advocate for the narrow scope they assert. Rather, when "rights in property" (such as ownership of a collection of medieval relics) are "taken in violation of international law" (such as systematic looting and forced sales that amount to the commission of genocide), a foreign state shall not be immune from the jurisdiction of U.S. courts. 28 U.S.C. § 1605(a)(3).

C. Contrary to Petitioners' and the Solicitor General's assertions, the Restatement of Foreign Relations Law of the United States does not foreclose the possibility that domestic takings violate international law.

Petitioners and the Solicitor General rely on Restatement (Third) § 712 (1987), as well as the reporter's notes and comment. These appear to assert that it is a violation of international law to take the property of a nation's citizens. Indeed, this is one type of violation of international law, but it would be illogical to assume that one possibility forecloses all others. cmt. a of that same section states that "this section sets forth the responsibility of a state under customary international law for certain economic injury to foreign nationals. *A state may have additional obligations under international agreements to which it is a party*." Restatement (Third) § 712 cmt. a (1987). Germany is a party to many international agreements and therefore has additional obligations under them.

One such additional obligation Germany has is an international agreement stemming from the Hague Convention of 1907, which sought to keep the interests of humanity safe even in times of war or conflict. The relevant Articles come from Section 3: Military Authority Over the Territory of the Hostile State. Article 42 defines occupied territory as "[territory] actually placed under the authority of the hostile army." Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning

the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, https://ihl-databases.icrc. org/ihl/INTRO/195. "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. *Private property cannot be confiscated*." *Id.* (emphasis added). Article 47 states that "pillage is formally forbidden." *Id.* In the case at hand, the Nazis controlled the German State between 1933 and 1945, and therefore any takings by the Nazis in pursuance of their policies of discrimination and exterminations of ALL Jews were in violation of the Hague Convention of 1907, to which Germany was a party. Indeed, Congress specifically agreed with this position in the Holocaust Victims Redress Act by finding that "[i]n defiance of the 1907 Hague Convention, the Nazis extorted and looted works of art from individuals and institutions in countries it occupied during World War II." Pub. L. No. 105-158, 112 Stat. 15 § 201(3) (1998). The Nazis controlled the German State, and therefore defied the 1907 Hague Convention by engaging in forced sales as alleged in the facts of this case. This policy was a violation of an international agreement Germany had already entered into, and under Restatement § 712 cmt. a, it has obligations under such, which were violated. Such a clear violation of international law, found within the argument Petitioners put forward to assert the opposite, shows that the law does not support in any way their interpretation of the expropriation exception.

III. THIS COURT HAS ALREADY DECLINED TO ADOPT THE NARROW READING OF THE EXPROPRIATION EXCEPTION WHICH PETITIONERS AND THE SOLICITOR GENERAL SUPPORT.

Bolivarian Republic of Venezuela v. Helmerich Payne, 137 S.Ct. 1312 (2017) also addresses the same question regarding the expropriation exception. In *Helmerich*, the court stated that "a sovereign's takings or regulation of its own nationals' property within its own territory is *often* just the kind of foreign sovereign's public act (a "*jure imperii*") that the restrictive theory of sovereign immunity *ordinarily* leaves immune from suit." *Id.* at 1321 (emphasis added). Subsequently, however, the court unambiguously held that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." *Id.*

Petitioners and the Solicitor General argue that the expropriation exception should be construed to *never* confer jurisdiction over a foreign state for takings from its own citizens, yet the court explicitly declined to adopt this reading in *Helmerich*. If the court wanted this to be true, "often" and "ordinarily" would be replaced with "always."

IV. PETITIONERS' POSITION WOULD RESULT IN UNCONSTITUTIONAL AND INEQUITABLE ACCESS TO U.S. COURTS.

Petitioners and the Solicitor General ask this Court to limit the right to sue for expropriation of property in instances where a violation of international law as egregious as the Holocaust is involved, and to individuals who were not citizens of the state that systematically sought their extermination. While there is some debate among historians as to how widespread and effective citizenship-stripping statutes were under national socialism, they were only one of many tools used by the Nazi regime throughout occupied Europe in ensuring the annihilation of Jews. What mattered above all else was whether a person was Jewish. Citizenship-stripping statutes were a component of a gradual persecution process, leading to the Final Solution. Even in the art market, German Jewish dealers and collectors were targeted early and consistently throughout the Third Reich. Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany*, page 65 (2000). Expropriation and denaturalization policies evolved, starting with political foes, then encompassing naturalized citizens, and soon thereafter German-born Jews. Robert M. W. Kempner, *Who Was Expatriated by Hitler: An Evidence Problem in Administrative Law*, 90 U. Pa. L. Rev. 824 (1942). It did not matter to the Nazis what ultimate category any given individual fell into, but rather that he or she was Jewish. As Jews living in Nazi Germany, they were systematically discriminated against and subject

to the expropriation of their art collections and other property. These acts were takings by the Nazi regime of Jewish property as a part of its genocidal campaign. It is therefore illogical to adopt Petitioners' position, because it would create impractical and unconstitutional categories based on differences the Nazis did not recognize when expropriating the property in question.

Therefore, Petitioners' position raises significant constitutional issues violative of the Due Process Clause. *Murray v. Giarratano*, 492 U.S. 1, 11 (1989). The goal of Nazi Germany's genocidal enterprise was irrespective of citizenship, status or otherwise, German and non-German Jews would eventually find themselves stripped of everything they owned and loaded on trains heading for extermination. A foreign Jew living in Germany, a German Jew living in Germany, and a German Jew who was a political foe and stripped of citizenship could well have been in the same deportation transport, and all three fates would have been the same. Assume for a moment, *in arguendo*, if all three of these individuals survived the Holocaust, moved to the United States and became United States citizens (which was a frequent occurrence after World War II), their ability to sue Germany to recover their expropriated property would be inequitable. This Court would be drawing a line between who was a foreign-born Jew and a German Jew, and an even more difficult line between who was or was not a full citizen of Germany at the time the expropriation took place. In other words, their access to adjudication in U.S. courts would be determined by their alienage at the time of persecution.

Indeed, this court has long upheld the "fundamental constitutional right of access to the courts." *Bounds*, 430 U.S. 817, 828 (1977). The right to be heard in court is an essential aspect of due process, and the right to be heard is a principle that "lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable." *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). If this Court adopts Petitioner's position, it is unavoidable that a United States citizen will be denied access to the courts based upon his or her prior citizenship, or even more attenuated, the citizenship of his or her ancestors at the time of the taking. This result contradicts the recognition that the right to be heard is essential to due process and is therefore unconstitutional.

V. OVERTURNING THE D.C. COURT OF APPEALS DECISION WOULD BE CONTRARY TO THE POLICY OF MULTIPLE CONGRESSIONAL ACTS, AS WELL AS THE EXECUTIVE BRANCH'S POSITION ON HOLOCAUST-ERA RESTITUTION POLICY.

Since the end of World War II, the United States has had a long-standing policy supporting those who seek justice for the wrongs perpetrated during the Nazi era. It has, time and again, promised a commitment to help restitute property and dignity back to those from whom it was taken. These policy goals have been upheld by this Court in landmark cases like

Republic of Austria v. Altmann. Furthermore, Congress has consistently supported this policy by passing laws designed to carry out these goals, one of which being the HVRA in 1998. In this Act, it is stated that "[i]t is the sense of the Congress . . . that all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." Pub. L. No. 105-158, 112 Stat. 15 § 202 (1998). Congress took this a step further in 2016 when it passed the HEAR Act to make it significantly easier for victims of Nazi persecution to take legal action in the United States to recover Nazi-confiscated Art. Congress recognized that "[t]hese lawsuits face *significant procedural obstacles* . . . " and because of these findings, Congress set a statute of limitations that is significantly less burdensome to make it much easier for victims to seek redress. Pub. L. No. 114-308, 130 Stat. 1524, § 2(6) (2016). Finally, under the current administration, the JUST Act was passed. Pub. L. No. 115-171 (2018). The JUST Act was signed into law by President Trump, showing that both branches of government agree to support efforts to seek justice for those who go uncompensated by the atrocities of the Holocaust.

The JUST Act was signed into law to implement the goals of the Terezin Declaration of 2009, which states that stakeholders would "facilitate just and fair solutions with regard to Nazi confiscated and looted

art, and to make certain that claims to recover such art are resolved expeditiously *and based on the facts and merits of the claims* and all the relevant documents submitted by the parties. *Governments should consider all relevant issues when applying various legal provisions that may impede restitution of art and cultural property, in order to achieve just and fair solutions."* Holocaust Era Assets Conference, Terezin Declaration (2009) (emphasis added). The JUST Act requires a report by the Secretary of State assessing each participating country's national laws effecting the promises made through signing on the Terezin Declaration. This report was published in March 2020, and included a message from Secretary of State Mike Pompeo solidifying the Executive Branch's commitment in stressing that "[w]hen President Trump signed a landmark executive order on combatting anti-Semitism in December 2019, he also stressed the importance of 'strengthening restitution efforts,' which lie at the core of the Terezin Declaration." Office of the Special Envoy for Holocaust Issues, *Just Act Report* (2020). Further, the Summary section of the report states that "[t]he report reflects the importance the U.S. government places on finding a measure of justice for Holocaust victims, survivors, and their heirs and is intended to encourage reflection on best practices that might be employed to fulfill commitments countries took upon themselves by endorsing the Terezin Declaration." *Id.* Additionally, "[t]he report notes that a handful of the countries that endorsed the Terezin Declaration have yet to pass laws that facilitate the restitution of immovable property. In countries that have adopted

such legislation, too many claimants face discrimination *based on citizenship* and residency or are otherwise unable to benefit due to overly complicated administrative barriers." (emphasis added). The report recommends that these procedural bars on restitution ought to be lifted, yet, this is exactly the type of bar Petitioners and the Solicitor General are defending. Such a reading of the expropriation exception would promote discrimination based on citizenship, for one would have to be suing a country from which neither they nor their ancestors originated from. It would directly contradict the JUST Act's purpose, and therefore Congress's and the Executive Branch's intent, on the way the United States handles restitution matters.

Finally, from a historical perspective, this Court should undoubtedly agree that the Holocaust, and all of the events surrounding the genocide of the Jewish people, is the most flagrant violation of international norms governing human behavior ever committed by a civilized nation against a particular group of people, simply because of what they are. Lest it be forgotten that at the time the facts at issue in this case took place, every act of dispossession, of expropriation, of incarceration and of murder committed against the Jews in Germany represented well-organized chess moves, with the ultimate checkmate in their physical elimination, costing 6 million Jewish lives.

It is evident that State-sponsored persecution of minority groups and otherwise vulnerable communities on the basis of racial, ethnic, religious or other forms of supremacy, which lead to the marginalization,

pauperization, dehumanizing, and inevitably the physical elimination of these groups, constitutes clear violations of their cultural rights, their human rights; they are crimes against humanity.

All three branches of the government have made it evident that the United States believes that justice for these atrocities ought to be attained. To reverse the D.C. Court of Appeals would not only place a significant bar on any Jewish Holocaust survivor or their heirs to bring a restitution claim in the United States, but would end up rewriting the history of the persecution of Jews in Germany and in Europe.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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