Nos. 18-1447, 19-351

In the Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL.,
Petitioners,

v.

ROSALIE SIMON, ET AL.,
Respondents

FEDERAL REPUBLIC OF GERMANY, ET AL.,
Petitioners,

v.

ALAN PHILIPP, GERALD STIEBEL, AND JED LIEBER,
Respondents.

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

Amicus Curiae Brief of The 1939 Society, Michael Bazyler, Bet Tzedek, Center for the Study of Law & Genocide, and The Holocaust Education Center in the Desert, Inc. In Support of Respondents

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BRIEF OF *AMICI CURIAE*

Amici The 1939 Society, Michael Bazyler, Bet Tzedek, Center for the Study of Law & Genocide at LMU Loyola Law School, and The Holocaust Education Center in the Desert submit this brief supporting Respondents Alan Philipp et al. in *Federal Republic of Germany v. Philipp* and Rosalie Simon et al. in *Republic of Hungary v. Simon*.[1]

INTEREST OF *AMICI CURIAE*

The 1939 Society, formed in 1952 as The 1939 Club, is one of the oldest and largest organizations of Holocaust survivors and descendants in the United States. Its members and officers have included Jews that appeared on Schindler's list, including former president Paul Page, a survivor of Schindler's factory who convinced Thomas Keneally to write the book *Schindler's List* and Steven Spielberg to make the film based on it. In 1978, the organization created the very first chair in Holocaust studies in the United States at UCLA (now called The 1939 Society Samuel Goetz Chair in Holocaust Studies, named after one of our former presidents who pioneered Holocaust education in the United States). Twenty-one years ago, the Society initiated a Holocaust Art and Writing Contest at Chapman University for middle and

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, or counsel made a monetary contribution for preparation or submission of this brief. Counsel for the parties have consented to the filing of amicus briefs through letters filed with the Clerk of the Court.

high school students across the country, indeed, across the world. Between 7,000 and 8,000 students participate annually. Like tens of thousands of other Holocaust survivors, Page and Goetz died while awaiting some measure of compensation for the wrongs they suffered.

With all but one of the original members now deceased, and the remaining survivors past their golden years, the Society now consists of children and grandchildren of survivors and their supporters. Its primary mission is to develop Holocaust remembrance and education, and counter increasing Holocaust denialism.

Michael Bazyler is Professor of Law and the 1939 Society Law Scholar in Holocaust and Human Rights Studies at Fowler School of Law, Chapman University. He is the author of *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford University Press 2016), winner of the 2016 National Jewish Book Award, and *Law and the Holocaust: U.S. Cases and Materials* (Carolina Academic Press, co-authored with Robert M. Jarvis 2018), the first casebook on the relationship of the Holocaust to the law. He has testified in Congress on the issue of Holocaust restitution and his writings have been cited by the U.S. Supreme Court. He is the author of seven books and numerous articles on the subject of law and the Holocaust.

Bet Tzedek (Hebrew for "House of Justice"), an internationally recognized force in poverty law, was founded in 1974 to achieve full and equal access to justice for all vulnerable members of its

community. Bet Tzedek is widely respected for its expertise on Holocaust reparations and has represented over 5,000 survivors in reparations claims, free of charge. Bet Tzedek litigated the landmark case *Grunfeder v. Heckler*, 748 F.2d 503 (CA9 1984) and has been amicus in many Nazi looted art cases, including *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The **Center for the Study of Law & Genocide** at LMU Loyola Law School, Los Angeles was inaugurated in 2008, the 60th anniversary year of the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Center is uniquely the first of its kind at any U.S. law school to focus on legal aspects of, approaches to, and solutions for genocide and mass atrocities. Through coupling intellectual research and practical advocacy, the Center focuses on the remedies and victims of genocide and mass atrocities, aiming to help survivors achieve justice.

The Holocaust Education Center in the Desert, Inc. d/b/a Tolerance Education Center, located in Rancho Mirage, California, is a nonprofit organization focused on promoting tolerance, civility, respect and understanding by the elimination of atrocities, hatred, and bigotry. Founded by Holocaust survivor Earl Greif in 2006, it provides tolerance-themed programming, activities, and exhibits to students and adults with the intent of reducing prejudice and promoting diversity.

SUMMARY OF ARGUMENT

It is nothing short of *chutzpah*[2] for Germany and Hungary to appear before this Court to argue that the property takings at issue in these two cases were no different from commercial expropriations by any normal government of its own nationals' property. This argument amounts to Holocaust revisionism, trivializing the property takings at issue and minimizing the full scope, scale, and impact of the atrocities committed by both countries against the Jews of Europe.[3]

Jews—who during the Holocaust were defined as a matter of law by their respective countries as *untermenschen* (sub-human)—were stripped of their dignity, their citizenship, their nationality,

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[2] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring) (adding *chutzpah* to the Supreme Court lexicon).

[3] *See, e.g.*, F.R.G. Pet. Br. at 19 ("Respondents thus alleged a domestic taking, not a taking 'in violation of international law'"), 36 ("Respondents do not allege genocidal acts here…. The property at issue was not essential property, like food, medicine, or shelter, but an art collection…. Prussia bought the collection not to cause anyone's death, but because the Welfenschatz was 'historically, artistically and national-politically valuable' to Germany"), 50 ("Respondents ask a U.S. court to judge the propriety of Germany's actions within its own borders toward its own nationals"); Hung. Pet. Br. at 2 ("all the relevant conduct occurred in Hungary when all Plaintiffs and putative class members were Hungarian nationals"), 3 ("Plaintiffs have asserted garden-variety common-law claims") 4 ("Adjudicating these claims would inevitably disrupt foreign relations"), 17 ("Any U.S. interest in this foreign-centered case is vanishingly small"), 18 (describing the Hungarian Holocaust as "another sovereign's wartime conduct within its own territory that harmed its own nationals").

their property, and, for over 6,000,000 of them, their lives. The entire premise of the Holocaust, especially as to the looting of Jewish property, was that Jews were *never* to be accorded the status of citizens or nationals. Both Germany and Hungary treated Jews as aliens, stateless people with no rights under law.

Germany's shocking revisionist assertions in this litigation are all the more surprising considering that the post-war Federal Republic of Germany has long acknowledged the nation's guilt during the Nazi era, and has played a leading role in promoting Holocaust education, pursuing prosecutions of genocide both before international tribunals and in its own domestic courts, and providing reparations.

Further in alignment with its revisionist stance, Germany argues that genocide as a matter of international law (even by a state as to its own people) does not include non-life-threatening economic deprivation. Indeed, the thrust of Germany's position in this case is that the period between 1933-35 was not genocidal. In attempting to characterize the forced sale of the Welfenschatz from Jewish art dealers to the Prussian state at well below market value as a garden-variety "domestic taking"—and thereby uncouple it from the well-documented and deliberate theft of Jewish property and means of subsistence that was part and parcel of the Holocaust—Germany has engaged in an insidious form of historical and legal revisionism that is tantamount to Holocaust denial.

Hungary similarly portrays the claims in *Simon* as "garden-variety common-law claims" for property loss.[4] Contrast this with the finding of the Court of Appeals:

> Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary. More than 560,000 Hungarian Jews—68% of Hungary's pre-war Jewish population—were killed in one year. In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million Jews into Hungarian railroad stations, stripped them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon arrival.[5]

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[4] Hung. Pet. Br. at 3.

[5] *Simon v. Rep. of Hungary*, 911 F.3d 1172, 1175 (CADC 2018) (internal formatting and citations omitted). As the leading text on the Hungarian Holocaust explains: "[A]fter the German occupation of Hungary on March 19, 1944, Hungarian Jewry was subjected to the most ruthless and concentrated destruction process of the war…. For the Germans and their Hungarian accomplices, time was of the essence…. Aware of the impending Axis defeat, they were resolved to win at least the war against the Jews…. Uninformed about the realities of the Final Solution program and unprepared for any possible emergency measures, the Hungarian Jews became easy prey for the Nazis and their Hungarian accomplices. Hungary (with the notable exception of Budapest) became *Judenrein* (free of Jews) within fewer than four months." Randolph L. Braham, *The Politics of Genocide: The Holocaust in Hungary* 13-14 (condensed ed. 2000).

Petitioners' spurious assertions are a denial of the proven fact that the Holocaust was a process implemented over a period of years and began in January 1933 upon Adolf Hitler coming to power. They are a denial of the proven fact that the Holocaust was an intentional, systematic program of destruction that flowed from Nazi Party thinking dating back to 1919. They are a denial of the proven fact that there never could have been acceptance of deportations and killings without the slow, steady actions of the Nazi State cloaked in legality that normalized the abuse of Jews, including depriving them of their property and moving that property "legally" into the hands of non-Jews.

Petitioners' assertions amount to the same type of pseudo-legalism that the Nazis used to commit the Holocaust: "everything we did," said the Nazis, "was according to law." Indeed, it is questionable whether Petitioners would be comfortable making these same statements in their own home courts, as such statements could expose an individual to criminal liability under each country's penal codes prohibiting Holocaust denial and trivialization.[6]

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[6] *See* § 130(3)-(4) StGB (F.R.G.) ("Whoever publicly … approves of, denies or downplays an act committed under the rule of National Socialism … in a manner which is suitable for causing a disturbance of the public peace …. Whoever publicly … disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny and arbitrary rule, incurs a penalty of imprisonment"); § 333 BTK. (Hung.) ("Any person who denies before the public large the crime of genocide and other crimes committed against humanity by [N]azi and communist regimes, or expresses any doubt or

Petitioners' assertions are also a denial of the critical nexus established at Nuremberg where the Tribunal made clear that the crimes against humanity committed against the Jews were inextricably linked to the actions that were carried out from 1933-1939. Finally, they are a denial of Petitioners' acknowledgments in the Washington Conference Principles and Terezin Declaration—both of which Germany and Hungary signed—that illegal property transfers in the Holocaust dated from January 1933.

Petitioners' second tactic is to formulate a concept of "genocide" that would essentially read Article II(c) of the Genocide Convention into redundancy—or create a causal requirement that the Convention itself did not create (i.e., that one must link the economic deprivation directly to some specific killing). That is inconsistent with plain English and contrary to the drafting history of the Convention. It is an attempt to turn these cases into ordinary "commercial" cases involving taken or lost property of "nationals" by their respective governments instead of cases involving the Holocaust, Nazis, and Jews.

For the United States Government to acquiesce to these false assertions in its Amicus Curiae Briefs is especially disturbing, given that the United States has long been a leader in efforts to preserve the memory of the Holocaust and to bring a

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implies that it is insignificant, or attempts to justify them is guilty of felony punishable by imprisonment not exceeding three years.").

measure of justice to survivors for the massive theft of Jewish property that took place in Europe.[7] Moreover, it is a repudiation of 75 years of U.S. domestic and foreign policy expressly acknowledging that the methodical dispossession of Jewish-owned property was inextricably tied to the mass killing that followed—and that such dispossession began in 1933.

This is the face of Holocaust denial, and how such denial becomes normalized. When powerful and influential voices adopt such fallacies, or fail to contest them, dismissal of the Holocaust and its

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[7] The United States' historically inconsistent position in this appeal prompted the Conference on Jewish Material Claims Against Germany (Claims Conference) to issue a memorandum decrying what appears to be U.S. support for Germany's denialist statements:

> [A] recent amicus brief in support of certiorari filed in the U.S. Supreme Court by the Solicitor General appears to suggest that the United States could be wavering in its decades of commitment to restitution for Holocaust victims. The amicus brief is not reflective of the U.S. government's understanding, in other contexts and over many decades, of how and when the Holocaust unfolded. Without consistent commitment to the historical facts, the wall against Holocaust denial and distortion that the U.S. for so long has helped to buttress is weakened.

The Role of the United States in Pursuing Compensation for Holocaust Victims and Heirs, and the Historical Bases for U.S. Leadership, Claims Conference—Conference on Jewish Material Claims Against Germany 4 (9/23/2020), at http://www.claimscon.org/wp-content/uploads /2020/09/ 2020.9.23-The-U.S.-Role-in-Holocaust-Compensation-.pdf ("Claims Conference, *U.S. Role in Holocaust Compensation*").

trivialization become acceptable.[8] The last survivors of the Holocaust will soon no longer be with us to teach us from their own personal experience what can happen if the world forgets.[9] Two recent surveys indicate alarmingly high rates of a lack of Holocaust awareness in the United States.[10] At the same time, antisemitism is rising in schools and among younger populations.[11] When statements such as Petitioners make here go unchallenged, they gain respectability.

The Holocaust is the paradigmatic genocide, against which all others are measured. Motivated in part by the conviction that "[s]overeignty cannot

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[8] Mark Zuckerberg and Facebook recently acknowledged this reality. Sheera Frankel, *Facebook Bans Content About Holocaust Denial From Its Site*, N.Y. Times (10/12/2020).

[9] *See, e.g.*, Rob Schmitz, *75 Years After Auschwitz Liberation, Survivors Urge World To Remember*, NPR (1/27/2020).

[10] Press Release, *First-Ever 50-State Survey on Holocaust Knowledge of American Millennials and Gen Z Reveals Shocking Results*, Claims Conference (Conference on Material Claims against Germany) (9/16/2020), at http://www.claimscon.org/millennial-study/ (noting that 63% of all national survey respondents "do not know that six million Jews were murdered," while 11% of adults aged 18-39 believe Jews caused the Holocaust and 49% have witnessed Holocaust denial or distortion on social media or elsewhere online. Though 93% of adults believe that Holocaust education should be implemented in all schools, only 15 states currently adopt mandatory Holocaust education laws. *See id.* (referencing the Claims Conference's Holocaust Knowledge and Awareness Study).

[11] There was a 19% increase in antisemitic incidents in K-12 schools from 2018–19; in 2018 the FBI reported 656 hate crime incidents at K-12 schools and colleges. *See Audit of Antisemitic Incidents* 2019, Anti-Defamation League, at https://www.adl.org/audit2019 (last accessed 10/18/2020).

be conceived as the right to kill millions of innocent people," Raphael Lemkin—the distinguished Polish-Jewish jurist who fled the Holocaust and whose entire family was murdered (except his brother, who escaped to the Soviet Union)—coined the term "genocide" in 1944, as the world reeled for language to describe the horrors of the Holocaust and was actively involved in drafting the Genocide Convention.[12] In the decades since the Holocaust, it has become clear that it "is not only one of the best known and most horrific events in human history but also the most significant event to have shaped the corpus of international law and the legal systems of many nations since that time."[13]

Amici urge this Court not to accept Petitioners' denial and self-serving trivialization of the Holocaust. "By helping us recollect, law can help us guard against the day when that perpetual evil, analogous to the plague germ, might re-awaken."[14] Holocaust-related economic destruction, and the link between that destruction and the ultimate destruction of German and European Jewry, are historical and legal fact. Germany's and Hungary's

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[12] Stanley A. Goldman, *Prologue: The Man Who Made Genocide a Crime: The Legacy of Raphael Lemkin*, 34 Loy. L.A. Int'l & Comp. L. Rev. 295, 296-97 (2012) (discussing Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 79 (1944) (other citations omitted)).

[13] Michael J. Bazyler, *Holocaust, Genocide, and the Law* xix (2016) ("Bazyler, *Holocaust, Genocide, and the Law*").

[14] The Hon. Stephen Breyer, *Foreword*, in Simone Ladwig Winters, *Lawyers Without Rights: The Fate of Jewish Lawyers in Berlin after 1933* xiii (Eng. trans. 2019).

positions must be repudiated in the strongest possible terms.

ARGUMENT

I.
Petitioners' Historical And Legal Revisionism Is Tantamount To Holocaust Denial

The story of German Jewish lawyer Dr. Michael Siegel captures the humiliation and persecution against Jews—for no reason other than that they were Jewish—that was already well underway in March 1933. On March 10, Dr. Siegel went to the police headquarters in Munich to file a complaint regarding the unauthorized arrest of one of his clients. There he was "confronted by Nazi storm troopers" who beat him up, knocked out his teeth, and cut the legs off his pants. They placed a board around his neck with writing which appears to read "I will never again complain to the police," and

paraded him barefoot through the streets of Munich. The photograph of this incident vividly illustrates the reality of life for German Jews beginning in 1933. Photo courtesy of U.S. Holocaust Memorial Museum.[15]

Germany's argument with respect to foreign sovereign immunity contains a number of false narratives that are inexplicable in light of Germany's own acknowledgment of the legal and historical record.[16]

A. The Process of Separating Jews From Their Property and From the Social and Economic Life of Germany was Well Underway by 1935

It is well-established that the Holocaust began with Adolf Hitler's accession to the chancellorship on January 30, 1933.[17] Hitler's rise to power enabled him and the Nazi Party to enact racially and religiously discriminatory laws and policies that had long been part of the Nazi ideology and platform.[18]

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[15] Eric Schmalz, *The Story of Dr. Michael Siegel*, History Unfolded: US Newspapers and the Holocaust, United States Holocaust Memorial Museum, at https://newspapers.ushmm.org/blog/2017/12/19/dr-siegel/ (last accessed 10/18/2020).

[16] *See supra* n.3; *see also* F.R.G. Pet. Br. at 4, 6, 11, 21-22, 29, 36-37.

[17] *See* Brief of *Amici Curiae* Holocaust and Nuremberg Historians in Support of Neither Party ("Historians' Br."), at 4, 10-13; *see also U.S. Role in Holocaust Compensation* 25.

[18] Michael Bazyler, *The Thousand Year Reich's Over One Thousand Anti-Jewish Laws*, in The Routledge History of the Holocaust (Jonathan C. Friedman ed., 2011).

The Nazis' insistence on law as the basis for state action was in keeping with Germany's long tradition of legal positivism.[19] This legalistic approach provided cover to the Nazis for their formalized system of state persecution of Jews and enabled them to act ruthlessly and efficiently in their goal of "transform[ing] the status of Jews from citizens to noncitizens to subhumans not even worthy of life."[20] The economic woes brought on by the Great Depression fed into existing Nazi tropes pointing the finger at Jews for Germany's defeat in World War I and blaming them for the resulting economic and political instability.[21]

Thus, shortly after Hitler took power, a series of laws and decrees "began the process of identifying the Jews of Germany and separating them from public life":

- March 1933: Nazi storm troopers (*Sturmabteilung* or SA) began marking Jewish shop windows with the Jewish Star of David and the word *Jude* (Jew);
- April 1933: Laws were enacted barring Jews from government service and from serving as professors at public universities; Jewish students were prohibited from becoming lawyers;
- May 1933: Books by Jewish authors were burned at mass rallies;

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[19] Bazyler, *Holocaust, Genocide, and the Law* 3-4.

[20] *Id.*

[21] *Id.* at 5.

- A series of additional laws enacted between April 1933 and May 1934 variously forbade, for example, the listing of Jewish holidays on office calendars, the appearance on stage of Jewish actors, and the use of Yiddish in cattle markets;
- May 1934: The Nazi newspaper *Der Sturmer* released an issue reviving the Medieval "blood libel," which accused Jews of the ritual murder of Christian children.[22]

In 1935, the Nazis enacted a series of anti-Semitic laws—including the "Law for the Protection of German Blood and Honor" and the "Reich Citizenship Law"—known colloquially as the Nuremberg Race Laws, that left no doubt as to the Nazis' ultimate goal of eradicating European Jewry. Jews were stripped of their German citizenship and removed from any protection of the German state; forbidden to display the national flag or national colors; forbidden to marry or have extramarital sexual intercourse with non-Jewish Germans and forbidden to employ German female domestic workers under age 45.[23] Supplementary laws defined exactly who was considered Jewish.[24]

The persecution of Europe's Jewish population accelerated during subsequent periods particularly characterized by expropriation, emigration, and

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[22] *Id*. at 7-8; *see also* Claims Conference, *U.S. Role in Holocaust Compensation* at 29-30 for a more detailed list.

[23] Bazyler, *Holocaust, Genocide, and the Law* 9.

[24] *Id*. at 11.

expulsion (1935-1939), concentration or ghettoization (1939-1941), and extermination or annihilation (1941-1945).[25]

The fact that the Holocaust unfolded deliberately in steps over time has been documented at length by legal historians and is captured in the UN's Framework of Analysis for Atrocity Crimes.[26] The Framework notes that atrocity crimes such as genocide "tend to develop in a dynamic process" and that "perpetrators need time to develop the capacity to do so, mobilize the resources, and take concrete steps that will help them to achieve their objectives."[27]

By 1937, "60 percent of the roughly 100,000 Jewish-owned businesses in Germany as of 1933 had been liquidated or "Aryanized" (i.e., taken over by non-Jews), the total wealth of German Jews had fallen by 40-50 percent, one-third of the German

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[25] *See id*. at 7-32; Claims Conference, *U.S. Role in Holocaust Compensation* at 31-33; *see also* Historians' Br. at 10-25.

[26] *See* Claims Conference, *U.S. Role in Holocaust Compensation* at 23-24; *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, United Nations (2014), at https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf ("*Framework of Analysis for Atrocity Crimes*") (last accessed 10/18/2020).

[27] *Framework of Analysis for Atrocity Crimes* at 3-4. For this reason, the Framework lists as Indicators enabling the circumstances or preparatory action of genocide the "[d]estruction or plundering of essential goods or installations for protected groups, populations or individuals, or of property related to cultural and religious identity" and "[m]arking of people or their property based on affiliation to a group." *Id*. at 16.

Jewish population had fled the country, and nearly all of the Jews remaining were working for themselves or each other or unemployed and dependent on the community's relief measures."[28]

Clearly, economic oppression through property-taking was a key tool of the Holocaust process. The stolen booty was used to enrich German government officials, lawyers, real estate brokers, art and auction houses, and "banks that matched buyers and new managers to properties."[29] In this way, "Göring thus succeeded in grasping the bulk of Jewish assets for the national treasury."[30]

In this context, it is plain to see that the June 1935 forced sale of the Welfenschatz to the Prussian state was both emblematic of and inextricable from the Holocaust that was already well underway.

B. Forced Sales of Jewish-Owned Property at Below Market Prices were a Defining Feature of the Holocaust

During the Holocaust, one of the favored methods of stealing Jewish property was to force the victims to sell their possessions at very low prices as they would flee to safety. Such forced

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[28] Peter Hayes, *Plunder and Restitution: Learning How to Steal: Germany, 1933-1939*, in *The Oxford Handbook of Holocaust Studies* 542 (Peter Hayes & John K. Roth eds., 2010) ("Hayes, *Plunder and Restitution*").

[29] *Id*. at 544.

[30] *Id*.

sales by desperate Jews trying to save their lives were nevertheless viewed as legal during the war.[31]

The decision to sell the Welfenschatz for significantly less than its actual value was no more voluntary than the mandatory "flight tax" Jews were required to pay in order to leave Germany.[32] None were done by free will; all were done for survival. Thus, Germany's refusal to return the Welfenschatz to the undisputed rightful heirs of its prewar owner renders the collection one of the "last prisoners" of World War II.[33] Historians today also recognize that "[t]he return of looted art is not just about objects; it is about the restoration of dignity and respect to those whose basic humanity was denied."[34]

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[31] Forced sales are "sometimes called 'fluchtgut' or 'fluchtkunst' ('flight goods' or 'flight art,' which are cultural objects sold, generally at a steep discount, by owners desperate to finance their escape from Nazi-occupied or threatened areas)." Kevin Ray, *The Restitution, Repatriation, and Return of Cultural Objects: Restitution of Cultural Objects Taken During World War II (Part I), Cultural Assets*, Cultural Assets (3/19/2015).

[32] *Aryanization*, in *Holocaust Encyclopedia*, U.S. Holocaust Memorial Museum, at https://encyclopedia.ushmm.org/content/en/article/aryanization (last accessed 10/18/2020); *see also* Hayes, *Plunder and Restitution* at 544 ("In the succeeding years, the regime may have raked in as much as half of the remainder through additional impositions … [such as] the terms of the Eleventh Decree to the Reich Citizenship Law, which declared that the property of German Jews 'fell' to the state at the moment they exited the country, whether through emigration or deportation.").

[33] *See* Bruce Hay, *Nazi Looted Art and the Law* 1 (2017).

[34] Deborah Solon, *Returning Stolen Art to Its Rightful Owner is Also About Restoring Dignity*, L.A. Times (12/17/2016).

Scholars readily recognize the inextricable nexus between plunder and genocide. The rhetoric behind both destructive campaigns undertaken by the Nazis "shared a pathology of domination, subjugation and extermination."[35] During the 20th century, art collecting by Jews signified integration with Western Christian society and, from the Nazi perspective, unacceptably tainted Aryan culture, just as the existence of Jewish people tainted the Aryan race.[36] The Holocaust forced Jewish families to sell their artwork at basement prices to fund their escapes; thus, such cultural objects have come to be known as "flight art."[37] Given this context, the restitution of such art provides an opportunity to bring justice to Holocaust victims.[38]

C. Germany Has Long Acknowledged its Responsibility for Holocaust Restitution Claims Dating to January 1933

What makes Germany's position in this litigation especially shocking is the fact that Germany has long acknowledged in both its domestic law and international agreements that its

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[35] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?* 22 Eur. J. Int'l L. 49, 57-58 (2011).

[36] *See* Emily Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?* 51 DePaul L. Rev. 1103 (2002); Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U.PA. J. Int'l Econ. L. 383, 383-84 (2000).

[37] *See* Ray, *supra* n.32.

[38] O'Donnell, *supra* n.36, at 54.

responsibility for compensating Holocaust property takings dates to Hitler's ascension on January 30, 1933. For Germany to revise and minimize the historiography of the Holocaust in order to prevail in this litigation is appalling.

In 1951, a coalition of Jewish organizations from around the world established the Conference on Material Claims Against Germany (the "Claims Conference") to secure recognition, compensation, and restitution for Holocaust survivors and their heirs.[39] Since its founding, the Claims Conference has acted as the primary negotiating vehicle with Germany and Austria for victims of Nazi persecution and is the legal successor to unclaimed property.[40] In 1952, Germany entered into agreements with both the Claims Conference and Israel (the so-called Luxembourg Agreements) in recognition of the "unspeakable criminal acts … perpetrated against the Jewish people during the National-Socialist régime of terror."[41]

Germany first acknowledged its responsibility for Holocaust restitution claims in domestic law in the May 26, 1952 Allied-German Convention on the Settlement of Matters Arising out of the War and the Occupation (as amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany ("Paris Protocol") of

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[39] Claims Conference, *U.S. Role in Holocaust Compensation* at 6.

[40] *Id*.

[41] *See* Agreement Between the State of Israel and the Federal Republic of Germany, Preamble, 1953 U.N.T.S. 206 (Sept. 10, 1952).

October 23, 1954).[42] This Convention continued for the newly established Federal Republic of Germany (i.e., West Germany) the Allied Restitution Laws established by the United States, Britain, and France in the immediate post-war period—all of which allowed claims for the confiscation or transfer of property that occurred for reasons of race, religion, nationality, political views, or opposition to National Socialism (Nazism).[43] Jews were presumed to have lost property as a result of Nazi persecution.[44]

West Germany's Federal Compensation Act of 1956, retroactive to 1953, covered all claims not otherwise covered by the existing restitution law and included damage to professional advancement, damage to property, and damage to a business or professional career.[45] Under these laws and their subsequent amendments and additions, as of December 2011 the German government had paid out €46.726 billion, of which €216 million was in property claims alone.[46]

In 1957, West Germany passed the German Federal Restitution Law, which filled gaps not

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[42] Michael J. Bazyler, K. Lee Boyd, Kristen L. Nelson, & Rajika L. Shah, *Searching for Justice After the Holocaust: Fulfilling the Terezin Declaration and Immovable Property Restitution* 158-59 (2019) ("Bazyler et al., *Searching for Justice*").

[43] *Id*. at 158-59.

[44] *Id*. at 158.

[45] *Id*. at 159.

[46] *Id*. at 160.

covered by the Allied Restitution Laws by allowing for compensation of property no longer traceable.[47]

In 1990, before German reunification, the German Democratic Republic (East Germany) passed the Act on the Settlement of Open Property, which assisted with restitution claims by victims of Nazi persecution even where the property was subsequently re-nationalized during the Soviet era.[48] A 1994 companion law contained the separate Nazi Persecution Compensation Act; both of these acts compensated for Nazi property takings that occurred between January 30, 1933 and May 8, 1945 in the former East Germany.[49]

In 2000, a U.S.-Germany bilateral agreement established the German Foundation for Remembrance, Responsibility and Future (the "Foundation") and settled claims against German companies for slave labor and related claims.[50] In addition to providing compensation to former slave and forced laborers, the Foundation provided compensation payments to persons who suffered loss or damage to property during the Nazi era as a result of racial persecution or other Nazi wrongdoing and had been ineligible to file claims under previous compensation schemes.[51]

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[47] *Id*.

[48] *Id*. at 161.

[49] *Id*.

[50] This agreement, known as the Berlin Accords, did not include claims for Nazi-looted art.

[51] *Id*. at 162.

Thus, Germany's position before this Court is contrary to its own longstanding approach to the Holocaust in German domestic law after World War II and in international restitution agreements—including its own bilateral agreement with the United States.

II.
By Uncoupling Property Theft from Genocide, Petitioners Seek to Reformulate the Established Concept of Genocide

Germany's remarkable argument with respect to the connection between genocide and property theft appears most clearly in the following passage:

> Respondents do not allege genocidal acts here…. The property at issue was not essential property, like food, medicine, or shelter, but an art collection…. And Prussia bought the collection not to cause anyone's death, but because the Welfenschatz was "historically, artistically and national-politically valuable" to Germany…. 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,"… undertaken to cause the extinction of the Jewish people…. [The court of appeals] broadened the definition of genocide to include any discriminatory act against a protected group by a regime that committed genocide.[52]

[52] F.R.G. Pet. Br. at 36-37.

This argument is historically and legally spurious for multiple reasons.

A. The Genocide Convention Confirms that Property Theft is Integral to Genocide

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") contains the universally agreed definition of genocide in international law. That definition states in full at Article II:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Nothing in the text of the Genocide Convention requires that a genocide occurs only when there is killing. The acts described in Article II(a)-(e) are not listed conjunctively, but rather disjunctively.

Any one of them can satisfy the actus reus of genocide.[53]

Nor is there evidence that the acts covered by Article II(c), the provision at issue here, only include conditions amounting to a "measure[] of slow death," as Germany suggests in its brief.[54] The leading legal text on the Genocide Convention notes that Article II(c) encompasses acts of omission or "negative violence."[55] In fact, specifically unlike acts falling within the definition at Article II(a) or II(b), Article II(c) "does not require proof of a result. … The conditions of life must be calculated to bring about the destruction, but **whether or not they succeed, even in part, is immaterial**."[56]

The forced sale of the Welfenschatz to the Prussian state falls under Article II(c) because, as established in this brief, it was part of the Nazis' scheme to separate Jews from their property and

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[53] *See* William A. Schabas, *Genocide in International Law: The Crime of Crimes* 27 (2000) ("Schabas, *Genocide in International Law*") ("Genocide did not necessarily imply the immediate destruction of a national or ethnic group, but rather different actions aiming at the destruction of the essential foundations of the life of the group, with the aim of annihilating the group as such."); *see also* S.C. Res. 925, U.N. SCOR, 3388th mtg. at 1, U.N. Doc. S/RES/925 (1994) (noting "acts of genocide").

[54] *See* Schabas, *Genocide in International Law* 189-91 (discussing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (9/2/1998), ¶ 505; *Prosecutor v. Karadžić et al.*, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (7/11/1996).

[55] *Id*. at 177.

[56] *Id*. at 192 (emphasis added).

deprive them of the means to support themselves or to finance their flight. It did not occur in an otherwise pristine vacuum, but rather formed an integral part of Hermann Göring's plan to "purify" Germany of the Jewish taint by robbing the Jews of their property.[57]

B. The Genocide Convention's Drafting History Supports an Expansive Reading of Article II(c)

The Genocide Convention's initial draft, proposed in 1947 by the UN Secretariat, sought to enumerate particular acts that constituted genocide. Thus, the draft defined genocide as, *inter alia*, "[c]ausing the death of members of a group or injuring their health or physical integrity by … deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned."[58]

Though this language was not included in the final Genocide Convention, there is no evidence that it was removed because of disagreement that

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[57] This inextricable link between the deliberate economic duress imposed on Jews by the Nazis and the Nazi plan to exterminate the Jews was recognized at the post-war Nuremberg trials (both the International Military Tribunal that tried major Nazi war criminals and the Nuremberg Military Tribunal trials conducted by the U.S. occupation authority); this connection is described in more detail in the Historians' Brief. *See* Historians' Br. at 26; *see also* Claims Conference, *U.S. Role in Holocaust Compensation* at 22-23.

[58] U.N. ESCOR, U.N. Doc. E/447 (1947).

such acts constituted genocide.[59] Rather, to avoid the misunderstanding that the examples given were meant to be exhaustive, the long list of genocidal acts was condensed in the final text in order to *broaden* the definition, thereby making it more inclusive.[60]

Thus, the Court of Appeals' recognition of the centrality of property takings in the commission of the Holocaust as expressed through Article II(c) comports with both the established history of the Holocaust and the legal understanding of genocide.[61]

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[59] *See* Schabas, *Genocide in International Law* 189-90. For example, the United States' only objection to the language of this early draft was the inclusion of the word "all" because it "seem[ed] unduly to narrow the crime." Hirad Abtahi & Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* 538 (Vol. 1 2008).

[60] *See* Historians' Br. at 27-28. Indeed, it is clear that the genocidal acts of the Nazis inspired the passage of Article II(c). Florian Jeßberger, *The Definition and the Elements of the Crime of Genocid*e, in *The UN Genocide Convention: A Commentary* 100 (Paola Gaeta, ed. 2009).

[61] Courts around the world have confirmed the same principle. *See, e.g.*, *Al Anfal*, Case No. l/CSecond/2006, Cassation Chamber Judgment, 2-10 (Iraqi High Trib. 2007) (holding Ali Hasan Al-Majid guilty of genocide in accordance with Article II(c) by "imposing economic embargo" over Kurdish territory, prohibiting "agronomy, and agronomical and industrial investment"); *Chief Prosecutor v. Moulana Abdul Kalam Azad*, Case No. 05 of 2012, 21 (ICT-BD, Jan. 2013) (Bangl.) ("killing, destruction and looting of properties, mental harms… inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy"); *Nulyarimma v. Thompson* (1999) FCR 1192, ¶9 (Austl.) (acts including the dispossession of land would constitute a genocide).

III.
The Solicitor General's Brief Disregards The United States' Consistent Support Of Holocaust Restitution Efforts Stretching Back To 1933

It is shocking that the U.S. government has supported Germany's denialism.[62] The Solicitor General is willing to conclude that these were commercial expropriations by any normal government of its own nationals' property. In this respect, the U.S. government fully embraces Germany and Hungary's positions while ignoring our nation's long history of refusing to treat forced sales by Holocaust victims, such as the sale of the Welfenschatz, as isolated, arms-length transactions divorced from the events surrounding them.

The United States government has repeatedly recognized that forced transfers of Jewish property during the Holocaust amounted to theft, requiring restitution or compensation. Indeed, as early as April 1949, the State Department issued Press Release No. 296, emphasizing the U.S. Government's "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the [Nazis]":

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[62] *See* U.S. Br. (*Philipp*) at 13 ("[a]s it comes before the Court, this case presents allegations that the German government expropriated the property of German nationals"), 27-28 ("Moreover, even with respect to settled instances of genocide like the Nazi Holocaust, questions may remain regarding the onset, scope, and nature of the genocide. For example, in this case, the German government has asserted that the particular forced sale did not occur within the scope of the Holocaust.").

> it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and … the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[63]

This early statement indicates the importance of returning property to rightful owners and considering historical circumstances when reviewing such claims.

The U.S. Brief is a direct repudiation of longstanding U.S. policy running in a straight line from:

(a) the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (the "London Declaration"), signed by the United States, which recognized the "systematic spoliation" which "extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings" that were designed to "enrich and strengthen their oppressors";[64] to

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[63] *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (CA2 1954).

[64] Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory

(b) the Charter of the International Military Tribunal at Nuremberg (the "London Charter"), signed by U.S. Supreme Court Justice (and lead Nuremberg prosecutor) Robert Jackson, which vested the tribunal with the power to try "persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal";[65] to

(c) the Nuremberg indictments, Justice Jackson's prosecution presentations relating to the 1919-1939 period, and Tribunal findings (including by U.S. judge and former Attorney General Francis Biddle).[66] Indeed, the purpose of having Justice Jackson in the role of lead prosecutor at Nuremberg was to emphasize that the Nuremberg trials—as with all cases, including this one—were to be decided by the rule of law, not the rule of politics; to

(d) U.S. Military Law No. 59, applicable in the post-war American zone of occupation, which made presumptively voidable any transaction involving a Jewish transferee after January 30, 1933);[67] to

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Memorandum issued by the Parties to the Declaration) London, Jan. 5, 1943; *see also* Claims Conference, *U.S. Role in Holocaust Compensation* at 8-9.

[65] Charter of the International Military Tribunal, Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 1951 U.N.T.S. 280, Art. 6(c) (Aug. 8, 1945).

[66] *See* Historians' Br. at 26.

[67] *See* Claims Conference, *U.S. Role in Holocaust Compensation* at 10-11.

(e) the Washington Conference Principles[68] and Terezín Declaration, which urged that "every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales, and sales under duress of property, which were part of the persecution of these innocent people and groups" during the Holocaust.[69] The Washington Principles established a set of standards addressing the need for international cooperation in resolving the Holocaust's tragic aftermath. The Terezín Declaration reiterated the Washington Principles' resolve to promote justice for victims of the Nazis. The United States played a prominent role in drafting these documents, establishing a norm—now part of international customary law—to promote justice by advocating that Holocaust-era claims must be resolved fairly and justly, with the goal of resolving them on their facts and merits rather than on technical legal defenses; to

(f) the U.S. Holocaust Expropriated Art Recovery ("HEAR") Act of 2016, unanimous and bipartisan legislation "ensur[ing] that claims to artwork ... stolen or misappropriated by the Nazis [beginning on January 1, 1933] are not unfairly barred by statutes of limitations but are resolved in

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[68] Washington Conference Principles on Nazi-Confiscated Art, *available at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ (last accessed 10/18/2020).

[69] Terezín Decl. ¶9, *available at* https://www.state.gov/p/eur/rls/or/126162.htm (last accessed 10/18/2020).

a just and fair manner."[70] It aims to ensure that claims to Nazi-confiscated art are adjudicated in accord with U.S. policy as expressed in the Washington Principles and the Terezín Declaration;[71] to

(g) the Justice for Uncompensated Survivors Today ("JUST") Act, signed into law in May 2018, requiring the State Department to report to Congress on the progress of countries participating in the Terezín Declaration regarding the return of property "wrongfully seized or transferred … including confiscations, expropriations, nationalizations, forced sales or transfers, and sales or transfers under duress during the Holocaust era;"[72] and to

(h) the Never Again Education Act, passed with near-unanimous Congressional approval and signed into law by President Trump on May 29, 2020.[73] Recognizing the decreasing number of Holocaust survivors and the importance of education in combating the rise of "intolerance, antisemitism, and bigotry," the Act authorizes funds for educational programs and resources to combat Holocaust distortion and denial.[74]

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[70] HEAR Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016), §§ 3, 4(3). The Holocaust did not begin in any other nation besides Germany until 1938.

[71] *Id.* at § 2(7).

[72] JUST Act of 2017, Pub. L. 115-171, 132 Stat. 1288 (2018), §§ 1(a)(3), 1(b).

[73] Never Again Education Act, Pub. L. 116-141, 134 Stat. 636 (2020).

[74] *Id.* §§ 2(3)-(5), 4-5.

The Foreign Sovereign Immunities Act itself specifies that art claims related to Holocaust-era expropriations are included in the general expropriation exception, defining the "covered period" as beginning on January 30, 1933.[75]

U.S. courts have also ordered restitution to Jewish claimants of Nazi-looted assets held in Swiss bank accounts and accounts transferred to the Nazis under duress from takings dating back to 1933.[76] Judge Edward Korman of the Eastern District of New York oversaw the claims process for the nearly $1.285 billion settlement of thousands of class action claims against Swiss banks in a decades-long process administered by Special Master Judah Gribetz and conducted through the Zurich, Switzerland-based Claims Resolution Tribunal. Every award was accompanied by a court order.[77]

That is over 75 years of consistent U.S. policy as to the process that was the Holocaust—and the central role that economic deprivation and destruction played in the ultimate mass killing. Thus, any assertion that the Holocaust did not

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[75] 28 U.S.C. §1605(h)(3)(c).

[76] *In Re: Holocaust Victim Assets Litigation*, Order, CV-96-4849 (EDNY Apr. 25, 2003) (applying a presumption "that German account owners and their heirs did not receive the benefit of any of their Swiss accounts closed on or after January 30, 1933"); *see also In re Accounts of Dr. Samuel Stiebel*, 220748/MG, Claims Resolution Tribunal (4/8/2004).

[77] *See In Re: Holocaust Victim Assets Litigation*, Special Masters' Final Report on the Swiss Banks Holocaust Settlement Distribution Process, CV-96-4849 (EDNY Mar. 28, 2019), at 1469-1556.

begin until the start of World War II in 1939 would be contrary to three-quarters of a century of American domestic and foreign policy.

CONCLUSION

These two cases are of great significance to the U.S. policy promoting a factual history of the Holocaust. In the face of growing Holocaust denial and distortion in the age of the Internet and social media, the need for accurate Holocaust historiography is even more critical.

Amici urge this Court to reject the denialist statements and rewriting of history contained in the Petitioners' and the United States Governments' briefs.

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