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

REPLY BRIEF

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PRELIMINARY STATEMENT

No brief could adequately recount the horrors of the Holocaust and the suffering that Germany inflicted during the Nazi era. Beginning in 1933, the German government systematically persecuted Jews and other groups, confiscating property and enacting discriminatory laws designed to impoverish and oppress them—and ultimately murdering millions. Nazi art seizures are an undeniable part of this history, undertaken both for internal political ends and to further the suffering of Jews and others. No one here disputes these facts, but they do not decide this case.

The questions presented do not ask whether Nazi Germany committed grave human-rights abuses, but which nation's institutions have the right and responsibility to provide justice to its victims. Since its founding after World War II, the Federal Republic of Germany has recognized its profound moral responsibility for the Holocaust and worked tirelessly to provide reparations to the victims of Nazi persecution. To date, Germany has paid over $86 billion in restitution and compensation to Holocaust victims and their heirs. And it has partnered with the United States to develop and promote worldwide solutions to the ongoing problem of Nazi-looted art. In recent years, it has identified and returned over 16,000 paintings, books, and cultural objects to survivors and heirs—efforts that the United States has commended, while urging Germany to do still more.

The United States' diplomatic efforts are welcome and essential. But the role of its courts is more limited. The Foreign Sovereign Immunities Act gives U.S. courts jurisdiction to hear claims against foreign states only in narrow circumstances, mainly involving foreign states' commercial activities in or directly affecting the United States. Congress has never given U.S. courts the power to judge claims that a foreign state violated its own nationals' rights within its own borders, even if the claims involve the most heinous violations of international law, such as genocide.

Respondents ask this Court to transform the FSIA's narrow expropriation exception into an exceedingly broad grant of jurisdiction over foreign sovereigns for alleged human-rights or law-of-war violations everywhere. And they ask this Court to mandate that federal courts exercise this jurisdiction by hearing suits against foreign sovereigns even when doing so would offend international comity and interfere with U.S. foreign relations. They would have U.S. district judges sit as a de facto world court, judging human-rights and war crime allegations wherever they arise—as a jurisdictional prerequisite to resolving common-law property claims.

The FSIA forecloses this result. Its narrow expropriation exception grants jurisdiction only over claims of takings that violate the well-settled international law of expropriation. And even if the FSIA did not expressly preclude courts from exercising jurisdiction over domestic-takings claims, it certainly does not *require* them to exercise jurisdiction, where doing so

would offend principles of international comity. Comity requires dismissal where a foreign sovereign has a profound interest in addressing claims of historical importance and where U.S. policy supports that interest.

The court of appeals' judgment marks an unparalleled expansion of federal jurisdiction over claims against foreign states involving their conduct abroad. This Court should reverse.

ARGUMENT

I. The expropriation exception does not cover Respondents' claims.

Under the expropriation exception, a foreign sovereign is not immune from suit in the U.S. in any case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Respondents think the exception asks *two* questions: Was there a taking? And did the alleged taking violate some principle of international law? Because genocide violates international law, they conclude that takings that constitute genocide must fit within the expropriation exception. Respondents' Br. 12. If that were so, the exception would provide jurisdiction over any taking allegedly connected to the violation of a human-rights or law-of-war norm.

Instead, the exception asks *one* question: Does a claim place at issue a "*property* right *taken in violation of international law*"? *Bolivarian Republic of*

Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017). As the text, context, and legislative history confirm, Congress understood "rights in property taken in violation of international law" to mean violations of the international law of expropriation. This narrow doctrine of international law, well-established by 1976 and unchanged since, is limited to states' takings of *foreign nationals'* property. Because a state's taking of a foreign national's property is a harm *to the foreign national's state*, international law gives the foreign state the right to demand compensation on behalf of its national. *See*, *e.g.*, Petitioners' Br. 17-18; Restatement (Third) of Foreign Relations Law § 712, note 1 (1987) ("Restatement Third") (describing history and purposes of doctrine). Only takings of "alien" property implicate the interstate relations protected by the law of takings; it is simply not concerned with states' treatment of the property of their own nationals, no matter how egregious. Since Respondents do not assert a violation of the international law of expropriation, Petitioners are immune.

A. Respondents' interpretation is contrary to the text and context of the expropriation exception.

Respondents support their interpretation of the exception by citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See* Respondents' Br. 11. But neither the majority nor dissenting opinions in *Bostock* support Respondents' construction, which separates one

part of the expropriation exception from its surrounding text and context.

Bostock does not conflate ordinary public meaning with a "hyperliteral meaning of each word in the text." A. Scalia & B. Garner, *Reading Law* 356 (2012). Instead, it explains that courts "must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context." 140 S. Ct. at 1750. And courts "must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally." *Id.* Respondents' approach violates these rules. While their interpretation may be "literally possible," the text and context of the expropriation exception as a whole show it is "not the meaning that Congress enacted." *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010).

1. Congress often uses words that have a specialized legal meaning; when it does, the specialized meaning controls. *See*, *e.g.*, *Hall v. Hall*, 138 S. Ct. 1118, 1124-25 (2018). This is such a case. The expropriation exception's words show that Congress understood *some* takings to violate international law. But which? At the time of the FSIA's enactment, the Restatement answered that question in a section entitled "When Taking is Wrongful under International Law." Restatement (Second) of Foreign Relations Law § 185 (1965) ("Restatement Second"). That section described principles "the United States has consistently advocated," addressing "the international responsibility of a state

for taking the property *of an alien*." *Id.* note 1 (emphasis added). Congress referenced this legal standard in the congressional report accompanying the FSIA: It called "taken in violation of international law" a "term," and it explained the meaning of that term by identifying specific violations of the law of takings. H.R. Rep. No. 94-1487, at 19-20 (1976) (providing examples drawn from Restatement Second § 185). Congress's focus on the law of takings makes sense, because the exception was one of a series of laws enacted by Congress to counteract Communist states' repudiation of this body of international law. *See* Petitioners' Br. 25-26 (explaining history); Br. of Mark Feldman as Amicus Curiae at 15-22, No. 18-1447 (same). In 1976, the term "taken in violation of international law" had one public meaning: property expropriated contrary to the international law of takings. It means the same today.

Respondents claim that the exception's words are not *identical* to the law of expropriation. Respondents' Br. 29-30. But the exception indisputably uses words "associated" with the law of takings, *see Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (statutory terms can be "imbue[d]" with a specialized legal meaning when Congress invokes "terms of art associated with that meaning"), and it even invokes the very name of the doctrine. Moreover, because the purpose of the FSIA was to codify pre-existing international-law principles, *see Samantar*, 560 U.S. at 319-20, it "fairly warn[s] readers" that its terms are likely to have significance in "an external source of

law," *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). For that reason, this Court has recognized that other immunity exceptions codified pre-existing legal doctrines even though they did not use identical terminology. *See*, *e.g.*, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007) (interpreting immovable-property exception as following Restatement Second § 68, despite use of different language); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992) (recognizing that "commercial activity" is a term of art denoting the restrictive theory of sovereign immunity, even though the words "restrictive theory" do not appear in the statute).

Respondents assert that if Congress meant to limit the exception to takings of aliens' property, it would have written "taken *from aliens*." *See* Respondents' Br. 28-30. But adding "from aliens" would have confusingly suggested that the exception was limited to claims by foreign nationals, not the U.S. nationals the statute aimed to protect. By using a term of art, Congress incorporated the *entire* meaning of those terms. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644-47 (2010). Here, that included the doctrine's fundamental limit that it covers only expropriations of the property of another country's nationals.

Finally, Respondents observe that the legislative history draws no distinction between foreign and domestic takings. Respondents' Br. 30. But it does. The

House report expressly called "taken in violation of international law" a "term," and it explained the meaning of that term by discussing the substantive standards of the international law of takings. *Cf. Air Wisc. Airlines Corp. v. Hoeper*, 571 U.S. 237, 246-47 (2014) (holding that Congress adopted the actual malice standard when it codified that standard into a statute, even though the statute lacked words "actual malice"). If Congress intended the exception to provide jurisdiction for takings that violate *any* norm of international law, the legislative history would have included other examples outside the international law of takings.

2. Respondents' approach violates *Bostock*'s recognition that "a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally." 140 S. Ct. at 1750. Viewed in isolation (as Respondents prefer), "violation of international law" includes genocide and other violations of human-rights and law-of-war norms. But courts do not pull apart the words of a statutory term, interpret each literally, then glue them back together. *See*, *e.g.*, *FCC v. AT & T Inc.*, 562 U.S. 397, 405-06 (2011). The exception lets plaintiffs bring property-rights claims (e.g., conversion or replevin) against sovereigns only when they allege a "*property* right *taken in violation of international law*." *Helmerich*, 137 S. Ct. at 1319. The only international-law doctrine providing compensation for taken property is the international law of takings. *See*, *e.g.*, Alice Ruzza, *Expropriation and Nationalization* ¶¶ 1-9, 30-32, in Oxford Public International Law

(2017) ("Ruzza"). The exception is thus naturally read as looking to violations of this body of law, because this norm is aligned with the plaintiff's substantive claim.

Human-rights norms, by contrast, protect people and groups against murder and death. They do not define when a state has wrongly interfered with property rights. Nor do they oblige states to provide compensation for property takings, as the law of takings does. Respondents' interpretation of the exception thus cleaves the allegedly violated international-law norm from the property focus of the exception. It requires courts to answer a question of profound political and diplomatic sensitivity—has a sovereign violated a core human-rights norm like genocide?—solely to gauge jurisdiction over a property-rights claim.

3. Other FSIA exceptions reinforce the point. When Congress wished to abrogate immunity for wrongs against persons, it did so explicitly. *See*, *e.g.*, 28 U.S.C. § 1605(a)(5) (abrogating immunity for certain personal-injury claims in the United States). The same is true for the state-sponsored terrorism exception—the only exception addressing human rights—which Congress limited to a narrow class of plaintiffs, defendants, and international-law norms. 28 U.S.C. § 1605A. Respondents never even try to square their expansive interpretation of the expropriation exception with the narrow exceptions Congress drew when explicitly addressing human-rights norms and wrongs to persons. Respondents' approach is unreasonable in the context

of the FSIA's provisions as a whole. *See*, *e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (noting that whether a word "extend[s] to the outer limits of its definitional possibilities" depends on full statutory text, purpose, and context).

4. The court of appeals' interpretation of the expropriation exception would cause the United States to violate international law by denying immunity to foreign sovereigns when international law requires it. Petitioners' Br. 32-33. It flouts this Court's admonition that the expropriation exception should not be read as a "radical departure" from the restrictive theory of immunity that the FSIA codified. *Id.* at 33-38 (discussing *Helmerich*, 137 S. Ct. at 1320). It invites foreign nations to reciprocate by opening their courts to suits against the United States for its own historical injustices. *Id.* at 38-39. And it departs from general principles of extraterritoriality, which counsel against interpreting statutes to reach claims of wrongdoing by foreign states against their own nationals abroad, with no meaningful tie to the United States. *Id.* at 39-40.

Respondents dismiss these points as "policy" arguments. Respondents' Br. 32-34. They are instead fundamental rules of statutory interpretation. While it is literally possible to read the exception to mean takings that violate *any* principle of international law, it is at least equally possible to read it to mean violations of the international law of takings. If the statute were ambiguous, the question would be which "literally possible" reading is "the meaning that Congress enacted." *Samantar*, 560 U.S. at 315.

Established rules of statutory interpretation answer that question. Statutes should not be interpreted to violate international law "if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). This rule of interpretation is particularly salient where statutes directly address international relations. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060-61 (2019) (applying principle to FSIA). Likewise, ambiguous statutory exceptions should be interpreted consistently with the statute's overall scheme. *See*, *e.g.*, *Maracich v. Spears*, 570 U.S. 48, 59-60 (2013). Statutes like the FSIA should, if possible, not be interpreted in ways that would "produc[e] friction in our relations with [foreign] nations" and cause foreign states to reciprocate against the U.S. *Helmerich*, 137 S. Ct. at 1322. And statutes should not be read to give U.S. courts jurisdiction over events and injuries abroad unless textually mandated. *See*, *e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106-10 (2016); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-67 (2004) (finding it unreasonable to apply U.S. antitrust law to foreign conduct that causes foreign harm).

The Court has used these tools in past FSIA cases. *See*, *e.g.*, *Helmerich*, 137 S. Ct. at 1320-22; *Samantar*, 560 U.S. at 317-25. All point away from Respondents' interpretation if there is any other possible interpretation of the text. There is: The exception must be read to create jurisdiction only for violations of the international law of takings.

B. No subsequent enactment supports Respondents' interpretation of the expropriation exception.

Respondents argue that various post-1976 enactments ratified their interpretation of the expropriation exception. Respondents' Br. 14-16, 19-26. But none of the statutes Respondents invoke amended the relevant language of the expropriation exception. Respondents cite them as evidence of a broad overarching U.S. policy to remedy Nazi wrongs, but the specific U.S. policy in this area is that foreign institutions—not U.S. courts—should decide disputes over allegedly Nazi-looted art located abroad.

1. Respondents rely heavily on the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 28 U.S.C. § 1605(h). What the Act clarifies, however, is what counts as commercial activity for the exception's commercial-nexus requirement, not the definition of "property taken in violation of international law." The Clarification Act arose from *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 312-15 (D.D.C. 2005), which held that foreign museums' loans of works to U.S. museums are "commercial activity in the United States" under the expropriation exception, even if the loaned work was immune from seizure under 22 U.S.C. § 2459. *Malewicz* "undermined the interests" Section 2459 "was designed to foster," making foreign states "less willing to loan cultural objects" to U.S. museums, harming the American public. H.R. Rep. 114-141, at 2-7 (2015). Congress therefore responded with the Clarification Act, providing that "in general"

activities related to loans protected by Section 2459 "shall not be considered to be commercial activity . . . for purposes of" the expropriation exception. 28 U.S.C. § 1605(h)(1). The Clarification Act did not address the part of the exception at issue here.

To be sure, the Clarification Act contained a "Nazi-era claims" exception, which specifies the Act's general rule did not apply

> in any case . . . in which rights in property taken in violation of international law are in issue *within the meaning of* [Section 1605(a)(3)] and—
>
> > (i) the property at issue is the work [loaned];
> >
> > (ii) the action is based upon a claim that such work was taken in connection with the acts of [a Nazi-controlled state between January 30, 1933, and May 8, 1945].

28 U.S.C. § 1605(h)(2)(A) (emphasis added). But this exception did not define which takings violate international law. It left the meaning of that phrase unaltered.

Sidestepping this, Respondents argue that the Nazi-era claims exception shows that the 2016 Congress thought that the 1976 exception encompassed Nazi-looted art. This argument is precisely the sort of argument *Bostock* rejected. *See* 140 S. Ct. at 1747 (holding that later Congress's assumptions about scope of Title VII did not define its scope).

Even if methodologically sound, the argument would be unpersuasive. Prior Nazi-looted art claims under the exception involved seizures of *foreign nationals'* property, claims that fall within the exception even under Petitioners' interpretation. *See*, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 680-82 (2004) (Austria's seizure of Czech national's art); *Malewicz*, 362 F. Supp. 2d at 301-02 (Netherlands' alleged taking of Russian national's art). So even if Congress assumed that Nazi-looted art claims would be brought under the existing expropriation exception, that does not tell us that Congress thought the exception reached domestic takings.[1]

Moreover, the Nazi-era claims exception applies only when the disputed work has been loaned into the United States. 28 U.S.C. § 1605(h)(2)(A)(i). Congress assumed that U.S. courts would exercise jurisdiction over disputed art *present in the United States*. Nothing in the Act suggests that Congress intended district courts to sit as international tribunals for Nazi-looted art claims worldwide.

2. Respondents cite other recent enactments in the same vein. Respondents' Br. 23-25 (citing Holocaust Victims Redress Act of 1998, Holocaust Expropriated

[1] Respondents contend that because the Clarification Act defines the "Nazi era" as 1933–45, it must reach Nazi takings from German nationals, Respondents' Br. 15, but that definition defines commercial activity under the exception, not which takings violate international law.

Art Recovery Act of 2016, and Justice for Uncompensated Survivors Today Act of 2017). None amended the FSIA. None defined alleged Nazi art seizures as "takings in violation of international law." None discussed suits over art located abroad. None discussed suits against foreign states. They all promote restitution of Nazi-seized property, but that policy interest cannot override the FSIA's actual words. *See Bostock*, 140 S. Ct. at 1753. What's more, the stated policy of the United States is to entrust foreign states to resolve Nazi-looted art claims within their borders through their own laws and institutions. *See infra* at 21, 25. This policy is contrary to Respondents' efforts to vest federal courts with worldwide jurisdiction over all Nazi-looted art claims.

3. Respondents claim there is an "international, decades-long understanding" that all Nazi-era takings violate international law and so must fall within the expropriation exception. Respondents' Br. 19-23. They rely on Military Government Law No. 59 to establish this supposed understanding. But Law 59 was instituted by the post-war U.S. military government in Germany in its capacity as the German sovereign. *See* U.S. Dep't of State, The JUST Act Report: Germany (2020), *available at* https://www.state.gov/reports/just-act-report-to-congress/germany/ ("JUST Act Report") (explaining history). The independent German state later adopted and strengthened the law, providing for restitution actions *in Germany* for many years. *See id.* Law 59 shows that the U.S. has viewed the restitution of Nazi-seized property in Germany as a matter for

resolution in Germany by German institutions, not a matter for U.S. courts.

Respondents likewise misinterpret the so-called Bernstein Letter, where the State Department opined that the act-of-state doctrine should not prevent review of Nazi-era confiscations. *See* U.S. Dep't of State, Press Release No. 296, 20 Dep't St. Bull. 573 (May 3, 1949). The act-of-state doctrine is not sovereign immunity, *see*, *e.g.*, *Altmann*, 541 U.S. at 700-01 (discussing relationship of the two doctrines), which the Bernstein Letter said nothing about. Respondents suggest that the Bernstein Letter means that, before Congress passed the FSIA, U.S. courts would have denied Germany sovereign immunity for alleged Nazi-era takings. But they cite no cases that did so, because before the FSIA, the United States followed the restrictive theory, which gave foreign states absolute immunity for sovereign acts such as property expropriations. In any event, the FSIA long ago supplanted the common law of sovereign immunity.

C. The Nazis' undisputed looting of art to persecute Jews is irrelevant to statutory interpretation.

Respondents and some amici rightly note that Nazi Germany's persecution of Jews began in 1933 and included theft of Jewish property, including art. And they show how persecution and economic discrimination facilitated the Nazis' later mass murder of Jews. Petitioners do not dispute any of this.

But the case before the Court does not turn on the historical relationship between the 1935 purchase of the Welfenschatz and the historical horror of the Holocaust. It turns on whether U.S. courts have jurisdiction under the expropriation exception to decide claims that foreign states took property from their own nationals in violation of human-rights norms. If they do, then U.S. courts must determine whether a plaintiff alleges facts amounting to a violation of international human-rights law. When plaintiffs rely on the law of genocide, courts will have to decide whether the specific taking alleged meets the legal definition of a genocidal act. And if such a taking were properly alleged, courts will have to determine, at summary judgment or trial, whether the plaintiffs have proven their claims of genocide as a requirement of jurisdiction.

Respondents, some amici, and the courts below mistake these legal questions for historical ones. They conclude that because Respondents allege the sale of the Welfenschatz was historically part of the Holocaust, it necessarily meets the legal definition of genocide. But as public international law scholars (many of whose work the court of appeals relied on) have explained, this historical approach is not how the law of genocide works. *See* Amicus Br. of Foreign Int'l Law Scholars 22-33. The purchase of art, stored in unoccupied Amsterdam, for millions of dollars, does not constitute an act calculated to physically destroy the Jewish people. *See id.*; Convention on the Prevention and Punishment of the Crime of Genocide, art. 2(c), Dec. 9, 1948, 78 U.N.T.S. 277.

If the expropriation exception provides jurisdiction over property claims for takings in violation of international human-rights and law-of-war norms, then federal courts must carefully analyze those legal norms. Courts must distinguish between persecution and genocidal acts, between incidental racial discrimination and systemic racial discrimination; they would need to rule on whether a foreign sovereign's military attack sought a concrete and legitimate military objective, and whether the harm caused to civilian property was proportional to that anticipated military advantage. And they would have to do all of this to determine jurisdiction to hear a conversion claim. Such inquiries—necessary if Respondents are correct—would constitute a truly "radical departure" from the FSIA's scheme. *See Helmerich*, 137 S. Ct. at 1315.

D. Respondents' new theory of the international law of takings is waived and erroneous.

Respondents suggest that even if the expropriation exception is limited to violations of the international law of takings, they alleged one, because the taking alleged here was not a "domestic" taking. Respondents' Br. 26-28. Respondents cannot cite anywhere that they previously raised this theory of jurisdiction—or anything like it. *See* Respondents' Br. 27-28. This Court should not consider a jurisdictional theory raised for the first time. *See*, *e.g.*, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397-98 (2015) (refusing to consider new theory of FSIA jurisdiction not raised below).

Regardless, Respondents' new theory misunderstands the international law of takings embodied in the exception. A state's regulation of property rights within its jurisdiction is a core sovereign power, governed only by domestic law. *See* Petitioners' Br. 17-18. But a state's taking of a *foreign* national's property implicates international law, because the taking transfers wealth from the foreign state to the taking state. *Id.* (citing sources). The law of takings exists to remedy this injury *to the foreign state*, by giving it the right to demand compensation on behalf of its national. *Id.*; *see also* Ruzza ¶¶ 1-3 (explaining origins of doctrine). The international law of takings is limited to takings of "alien" property because only those takings implicate the state-to-state relations protected by that body of law. *See*, *e.g.*, Restatement Third § 712, note 1.

Germany unquestionably discriminated against Respondents' ancestors. But Respondents do not and cannot contend they were not German citizens and nationals when the Welfenschatz was purchased.[2] More importantly, they do not and cannot contend they were nationals of *another* state. The only state involved here was Germany. While a state's mistreatment of its own nationals can violate *other* bodies of international law, it is not the type of injury the international law of takings addresses. Because Respondents do not claim that Germany took the property of foreign nationals, they

[2] As several amici note, laws depriving German Jews of citizenship were not enacted until after the 1935 purchase. Even then, German Jews generally remained German nationals for many more years.

do not allege a violation of the international law of takings.

Respondents try to transform a rule of international law concerned with state-to-state relations into a human-rights principle protecting people against the wrongdoing of their own states. They cite no international-law source supporting their reimagining of the law of expropriation.[3] Adopting this approach would expand the expropriation exception even further than the court of appeals did, because almost all plaintiffs invoking the expropriation exception allege that their state deprived them of full rights as nationals. *See*, *e.g.*, *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 547-51 (11th Cir. 2015). Unsurprisingly, every court of appeals decision to consider Respondents' theory has rejected it. *See id.* at 551; *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 n.6 (7th Cir. 2012).[4]

II. International comity warrants dismissal.

Even if the FSIA grants jurisdiction, U.S. courts can and should abstain from exercising it here. As the United States has recognized, post-war Germany's institutions have made tremendous efforts over seventy-five years to address Nazi Germany's unforgivable

[3] To the contrary, jurists still understand the law of expropriation as addressing only takings of foreign-owned property. *See*, *e.g.*, Ruzza ¶¶ 1–9, 30–32.

[4] Contrary to some amici, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), did not endorse this reasoning. It assumed it, because the appellant did not challenge it. *Id.* at 1023 n.2.

crimes. This includes paying billions of dollars in compensation to victims, funding Holocaust memorial sites throughout the country, and integrating Holocaust education into German schools. *See* U.S. Dep't of State, JUST Act Report. And in the context of Nazi-looted art, it includes joining with the United States to promote multilateral agreements encouraging nations to locate stolen art within their own borders, return it to its rightful owners, and resolve ownership disputes on the merits through efficient and fair ADR mechanisms. *Id.*

Germany has a compelling interest in allowing its institutions to address claims concerning its responsibility for the gravest sins of its history and to settle disputes about the ownership of art in its public museums. Equally important, the United States shares that interest. Since shortly after the War's end, U.S. policy has been to trust Germany to resolve Nazi-era restitution claims through its own laws and institutions, particularly when the claim involves identifiable property in Germany. *See*, *e.g.*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 961-63 (9th Cir. 2010) (discussing policy). The Washington Conference Principles are just one recent manifestation of this policy, which would be thwarted if U.S. courts sat as de facto appellate courts over the restitution decisions of U.S. partners like Germany. *See* Amicus Br. of United States 33. The FSIA lets courts consider these comity interests when foreign states are defendants, just when private parties are defendants. *See* 28 U.S.C. § 1606 (providing that foreign states without

immunity "shall be liable . . . to the same extent as a private individual under the circumstances").

A. Comity-based abstention is available in FSIA cases.

1. In arguing that comity-based abstention is never available in FSIA suits, Respondents conflate sovereign immunity and comity-based abstention. They are different doctrines with different purposes.

Abstention is appropriate here not because Germany is a defendant, but because Germany and the United States have a shared interest in allowing German institutions to address these claims. Germany would have the same comity interest if a private German museum were sued. U.S. courts abstain from exercising jurisdiction in suits against private defendants when a foreign state and the United States have a shared interest in allowing that state's institutions to address the subject matter. *See*, *e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 597-615 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004) (dismissing Nazi-era claims against a German bank). A foreign state's interest in allowing its own institutions to decide claims of profound historical, political, and moral significance to that state does not evaporate when the state itself is named a defendant. Since this form of abstention rests on a foreign state's interest in a case's *subject matter*—not its *status* as a defendant in a suit in U.S. court—it is simply not an immunity defense. The FSIA does not displace this

doctrine; it affirmatively accommodates it. *See* 28 U.S.C. § 1606; Amicus Br. of United States 31–32.

2. For the same reasons, permitting abstention in FSIA suits does not resurrect the uncertainty of the pre-FSIA era. Nearly all FSIA exceptions involve suits against foreign sovereigns acting in their private capacity in the United States, or in a manner directly affecting the U.S. *See*, *e.g.*, *Helmerich*, 137 S. Ct. at 1320. Foreign sovereigns rarely have a comity interest in having their own institutions resolve claims about their *commercial* actions. Even when they do, the U.S. interest in allowing U.S. courts to decide claims that implicate U.S. territory will counsel against abstention. The same is true for most expropriation-exception cases, which involve foreign states' expropriation of *American*-owned property. Only in foreign-cubed cases like this, where (if the Court finds jurisdiction) the FSIA reaches its outer limits, does comity-abstention become appropriate. The availability of abstention in this narrow category of suits causes no more uncertainty in FSIA suits than it does in suits against private defendants at the limits of other jurisdictional provisions like the Alien Tort Statute.

3. Respondents also contend that comity-based abstention duplicates *forum non conveniens*. Respondents' Br. 43-45. But the Court has already recognized, in addressing domestic abstention doctrines, that "the traditional considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722-23 (1996). Abstention accounts

for "deference to the paramount interests of another sovereign," while *forum non conveniens* "reflect[s] a far broader range of considerations," mainly the convenience of the parties and the practical difficulties of adjudicating a case in a forum. *Id.* The need to abstain from hearing some cases out of respect to foreign sovereigns is not satisfied by *forum non conveniens*.

B. Petitioners have not waived abstention.

Petitioners raised comity as a ground for dismissal in their motion to dismiss, *see* Defs.' Mot. to Dismiss at 40-51, ECF No. 18 (Mar. 11, 2016), pressed it in the court of appeals, Appellants' Br. 65-79 (Dec. 1, 2017), and sought and obtained a writ of certiorari on this ground, Petition at 30-39. In their briefs below, Petitioners spent nearly fifty pages arguing these points, focusing, as here, on Germany's and the United States' aligned policy interest in allowing German institutions to address these claims. *E.g.*, Mot. to Dismiss at 41-44.

Respondents complain that Petitioners make slightly different comity arguments than they did below. But even if that were so, "parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). In any event, the courts below did not reject the details of Petitioners' comity arguments; they held that the FSIA precluded *any* comity defense. Pet.App.16-21, 76-83. This Court can and should correct that erroneous holding.

C. Abstention is appropriate here.

Respondents argue against abstention here for two reasons. First, they say the United States has a strong policy interest in allowing U.S. courts to decide this case. Respondents' Br. 53. The United States disagrees. *See* Amicus Br. of United States 32–33. While the United States has a powerful interest in ensuring that victims of Nazi persecution obtain justice, the question here is *who* should provide that justice and *where*. On that point, U.S. policy has always advocated for foreign states to resolve ownership disputes over allegations of Nazi-looted property located within their jurisdiction through their own laws and institutions. *See*, *e.g.*, *Von Saher*, 592 F.3d at 961-63. The Washington Conference Principles underscore this longstanding policy, encouraging nations to develop their own processes to locate and return Nazi-looted art and to resolve disputes on the merits, preferably through ADR mechanisms, consistent with their own legal traditions. The U.S. interest thus aligns with Germany's: Both favor letting German institutions address these claims.

Respondents also contend that abstention is inappropriate because any suit they might bring in Germany would fail. Respondents' Br. 54-55. Germany already provided a forum through the Advisory Commission established under the Washington Principles. But even if formal judicial recourse were a prerequisite to comity, Germany provides it. While Germany's specific post-war Nazi restitution laws expired years ago, German courts still hear claims brought under general civil laws to avoid perpetuating Nazi injustice. *See*

Pet.App.201-10. The very case that established this principle was brought by a claimant *after* the Advisory Commission recommended against the return of an allegedly Nazi-looted art collection, showing that German courts permit claims like this and decide them on the factual and legal merits. Pet.App.206-08.[5]

If this case proceeded here instead, ordinary choice-of-law rules would require the district court to apply German law—and to decide complicated and (according to Respondents) unsettled questions of German law on available remedies and standards for restitution. German courts would not presume the authority to decide potentially difficult questions of U.S. law regarding U.S. responsibility to the victims of historical American injustices, such as compensation to the descendants of slaves. The United States should give present-day Germany the same respect. Germany's interest in allowing its own institutions to decide questions about its historical responsibility for the gravest sins of its history should not be cast aside simply because Respondents speculate that they will not prevail there.

[5] Respondents nowhere dispute that, for many years after WWII, they could have brought claims in Germany under specific post-war restitution statutes.

CONCLUSION

The Court should reverse and remand with instructions to dismiss the case.

Respectfully submitted,

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