No. _____

In The
Supreme Court of the United States

ALAN PHILIPP,
GERALD STIEBEL, AND JED LEIBER,

Conditional Cross-Petitioners,

v.

FEDERAL REPUBLIC OF GERMANY,
A FOREIGN STATE, AND STIFTUNG
PREUSSISCHER KULTURBESITZ,
AN INSTRUMENTALITY OF A FOREIGN STATE,

Conditional Cross-Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

NICHOLAS M. O'DONNELL
Counsel of Record
ERIKA L. TODD
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
(617) 338-2814
nodonnell@sullivanlaw.com

Counsel for Conditional Cross-Petitioners

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

ISSUE PRESENTED FOR REVIEW

Is the Federal Republic of Germany ("Germany"), a foreign state, subject to jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. § 1605(a)(3)) for claims to property that was taken in violation of international law because Germany's instrumentality (and possessor of the property at issue) Stiftung Preussischer Kulturbesitz ("SPK") is engaged in commercial activity in the United States?

PARTIES TO THE PROCEEDING

This conditional cross-petition is brought by Plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber ("Plaintiffs"). Defendants, the Federal Republic of Germany ("Germany") and its instrumentality Stiftung Preussischer Kulturbesitz ("SPK"), previously filed a petition for *certiorari*.

RELATED CASES

Philipp, et al. v. Federal Republic of Germany, et al., No. 1:15-cv-00266, U.S. District Court for the District of Columbia. Order denying Defendants' motion to dismiss entered March 31, 2017.

Philipp, et al. v. Federal Republic of Germany, et al., Nos. 17-7064 and 17-7117 (consolidated), U.S. Court of Appeals for the District of Columbia Circuit. *Per Curiam* Judgment affirming order of the District Court in part and vacating in part entered July 10, 2018; *Per Curiam* Order denying petition for rehearing *en banc* entered June 18, 2019.

Federal Republic of Germany, et al. v. Philipp, et al., No. 19A118, Supreme Court of the United States. Stay Application denied without prejudice July 30, 2019.

Federal Republic of Germany, et al. v. Philipp, et al., No. 19-351, Supreme Court of the United States. Pending as of this filling.

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The District Court denied Defendants' motion to dismiss on March 31, 2017. The decision is reported at 248 F. Supp. 3d 59 and reproduced, in the appendix accompanying Defendants' petition for *certiorari*, at Defendants' Appendix ("App.") 37–93. The opinion of the Court of Appeals is reported at 894 F.3d 406 and reproduced at App. 1–24. The order denying Defendants' petition for rehearing *en banc*, with the dissenting opinion, is reported at 925 F.3d 1349 and reproduced at App. 96–118.

BASIS FOR THIS COURT'S JURISDICTION

This is a conditional cross-petition by Plaintiffs pursuant to Supreme Court Rule 12.5. On July 10, 2018, the United States Court of Appeals for the District of Columbia Circuit entered an Order that affirmed the judgment of the District Court as to its denial of a motion to dismiss claims against Defendant Stiftung Preussischer Kulturbesitz ("SPK"), except that it ordered the District Court to dismiss the Federal Republic of Germany ("Germany") from the case. Defendants sought *en banc* review of this decision; that petition was denied on June 18, 2019. The District Court dismissed the Federal Republic of Germany on July 30, 2019. The petition for a writ of *certiorari* was docketed on September 18, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

This case is brought under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a).

This case is also proceeding under the Holocaust Expropriated Art Recovery (HEAR) Act of 2016 ("HEAR Act"), which expanded the availability of claims like Plaintiffs' arising out of art lost due to Nazi persecution. Pub. L. No. 114–308, 130 Stat. 1524 (2016); Supp. App. 177–84.

STATEMENT OF THE CASE

I. Introduction

The FSIA provides the comprehensive framework that addresses the availability of specific exceptions to sovereign immunity. The Federal District Courts have jurisdiction over actions against foreign sovereign defendants that lack immunity under the FSIA. 28 U.S.C. § 1330.

By dismissing sovereigns from cases that are within the FSIA, the Court of Appeals has rewritten the statutory test established by Congress. The text of the FSIA's expropriation exception is straightforward: a foreign state may be sued for claims concerning rights in property taken in violation of international law when either one of two commercial nexus tests is met: (a) the foreign state itself uses the property at issue within the United States in a commercial manner; or (b) the instrumentality of the foreign state that controls the property at issue meets a minimal threshold of commercial activity (activity by the instrumentality that the statute pointedly does not require to be related to the property at issue). Germany is subject to suit under the second prong of this test and the judgment dismissing it from the case should be vacated.

As noted in Plaintiffs' accompanying brief in opposition to Germany's petition for *certiorari*, this case does not require the Court's attention now because the SPK, the current possessor of the Nazi-confiscated property at issue, has been held amenable to suit. If, however, the Court determines that it wishes to

examine that part of the FSIA that determines what constitutes a taking of property in violation of international law or whether the SPK can assert a comity defense notwithstanding the FSIA's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state,"[1] then Plaintiffs respectfully submit that the full scope of the expropriation exception should be addressed. Specifically, Plaintiffs ask this Court to rule on the application of the commercial nexus test within the expropriation exception and hold that the statute means what it says: that a foreign state can be amenable to suit either when it uses the property at issue within the United States (not applicable to this case) *or* when its instrumentality controlling the property at issue (the SPK) is engaged in commercial activity in the United States (the reason the Court of Appeals correctly upheld jurisdiction over the claims in this case against the SPK). If any part of the expropriation exception is considered, Plaintiffs respectfully submit that both interpretation issues should be addressed together.

II. Factual Background

In 1929, five Jewish art dealers in Frankfurt, Germany—Zacharias Max Hackenbroch, Isaak Rosenbaum and Saemy Rosenberg, and Arthur and Julius Falk Goldschmidt (the "Consortium")—joined forces to purchase the Welfenschatz (or "Guelph Treasure" as it

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[1] *See Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2004) (*quoting Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

is commonly referred to in English), a peerless collection of over eighty pieces of medieval reliquary art. Supp. App. 2; 18; 22. In the early 1930s, the Consortium sold some pieces from the Welfenschatz to international buyers. Supp. App. 24–25. In January 1933, Hitler assumed control of Germany and everything changed. Supp. App. 27–31.

The Nazi government swiftly targeted the Consortium. On November 9, 1933, Mayor Friedrich Krebs ("Krebs") of Frankfurt wrote directly to Hitler: "According to expert judgment, the purchase is possible *at around 1/3 of its earlier value*. . . . I therefore request that you, as Führer of the German people, create the legal and financial preconditions for the return of the Guelph Treasure." Supp. App. 32–33 (emphasis added).

Soon after, Hermann Goering led the pursuit of the Welfenschatz. This was a familiar mission for Goering, who frequently coerced people into "negotiations" for the "sale" of their possessions, preferring bizarre transactional pretenses to simpler forms of theft, and obtaining steep discounts through duress. Supp. App. 2; 4; 6; 33–34; 45. One participant in the Welfenschatz scheme reported that the price they were pursuing (3.5 million RM) would be "very low"—just fifteen percent (15%) of the collection's actual value. Supp. App. 40.

These plans for a low purchase price were hardly incidental. Nazi Germany would not countenance fair payment to Jewish art dealers. Since 1933, when the art market was restricted to members of the Reich Chamber of Culture, Jews were effectively barred from the art trade. Supp. App. 46. Nazis used that law, among many other machinations, to sever Jews from

their livelihood. Supp. App. 29–31; 46–50; 52. In 1934, the Reich Chamber of Commerce forced Arthur and Julius Falk Goldschmidt to vacate their business premises; they found a back room to rent as subtenants, but sales dropped dramatically. Supp. App. 48–49. It was not enough merely for the Welfenschatz to "be won back for the German people," as Krebs wrote to Hitler. Supp. App. 31–32. Its Jewish owners must be punished, their means of survival destroyed.

After suffering through two years of the Holocaust, the Consortium had no choice. The coerced sale to Nazi agents, for a small fraction of the Welfenschatz's value, was signed on June 14, 1935. Supp. App. 54–55. The Consortium members were required to pay a commission, received a portion of the price into a blocked bank account, and had to repay the investors in the original 1929 purchase. Supp. App. 56–57. As the Nazis intended, the Jewish art dealers were unable to realize their own investment.

Through this forced sale, and other crimes of the Holocaust, the Consortium members' livelihoods were destroyed. Jews were not permitted to transfer cash abroad, and those who fled were subject to a flight tax. Supp. App. 57. Isaak Rosenbaum and Saemy Rosenberg paid the flight taxes and founded a firm in Amsterdam, but they had not escaped the Holocaust. Supp. App. 60. After the Nazis occupied the Netherlands, that firm was "Aryanized" by a German "manager"—that is, stolen. Supp. App. 59. Saemy Rosenberg's Gestapo file reports that he, his wife, and his daughter were officially stripped of their citizenship and their property. Supp. App. 60.

Arthur and Julius Falk Goldschmidt fled the country in 1936. Supp. App. 49. Julius Falk Goldschmidt was able to emigrate to London, but his cousin Arthur Goldschmidt was arrested in Paris and imprisoned in several camps. He arrived in Cuba in 1941, and then immigrated to the United States in 1946. Supp. App. 59.

Zacharias Max Hackenbroch died in 1937; just two months later, his widow was evicted from their house, which was turned over to the Hitler Youth. Supp. App. 58.

The Welfenschatz, meanwhile, sits today just where the Nazis wanted it—in the hands of the German government. On October 31, 1935, the Baltimore Sun reported that "[t]he bulk of the so-called Guelph Treasure, which was purchased by the Prussian Government" would be "presented to Adolph Hitler as a 'surprise gift.'" Supp. App. 61. This "surprise gift" became a prized centerpiece in Prussia's official art collection. After the war, it was transferred to the SPK, which was created to hold the cultural artifacts of former Prussia. Supp. App. 62.

III. Procedural Background

Two heirs of the Consortium filed a Complaint against Germany and the SPK on February 23, 2015. On January 14, 2016, they amended their Complaint to add a third heir as a co-plaintiff (the three collectively, "Plaintiffs"). Germany and the SPK moved to dismiss the Amended Complaint.

On March 31, 2017, the District Court largely denied Germany's and the SPK's motion. In particular, the District Court rejected both the SPK's and Germany's arguments that they were immune from jurisdiction under the FSIA. The District Court held that the FSIA's expropriation exception applied to the claims against Germany because the actions of Germany's instrumentality (the SPK) satisfied that exception's commercial nexus requirement.[2] The commercial nexus requirement contains two clauses, each of which contains a way to satisfy the nexus requirement. The District Court explained: "The crux of the issue before the Court is whether Plaintiffs must satisfy both clauses, the first to proceed against Germany and the second to proceed against its instrumentality SPK, or whether the two clauses present alternative requirements and, as such, Plaintiffs need to only satisfy one requirement to proceed." *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 73 (D.D.C. 2017). The District Court considered circuit precedent, concluded that the two clauses presented alternative requirements and that either would suffice, and therefore allowed the claims to proceed.

Germany and the SPK appealed on multiple grounds. The Court of Appeals largely affirmed the District Court's decision as to jurisdiction over the SPK, but reversed as to Germany's sovereign immunity.

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[2] The other elements of the expropriation exception were satisfied because the case involved property, and the property was taken in violation of international law. This is the subject of the Defendants' related petition, *Federal Republic of Germany, et al. v. Philipp, et al.*, No. 19-351.

Relying on *Simon v. Republic of Hung.*, 812 F.3d 127, 146 (D.C. Cir. 2016), the Court of Appeals held that Plaintiffs could not sue Germany without satisfying the first clause of the commercial nexus requirement.

Germany and the SPK petitioned for *en banc* review, which was denied on June 18, 2019. App. 96–97. Germany and the SPK now seek *certiorari*; their petition was docketed on September 18, 2019. Plaintiffs filed their brief in opposition on October 17, 2019.

REASONS TO GRANT THE CROSS-PETITION

Plaintiffs' claims against Germany and the SPK are founded in the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3). The expropriation exception establishes jurisdiction over foreign states that take property in violation of international law (*see*, *e.g.*, *Simon*, 812 F.3d 127) where a commercial nexus with the United States is also present. That commercial nexus requirement is satisfied in turn when the property at issue "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* at 140. The SPK, an instrumentality of Germany, "operates" the Welfenschatz in its art museum as that term is used in the FSIA, and the SPK is also engaged in commercial activity in the United States.

The United States has jurisdiction over both the SPK *and* Germany because the statute provides that a

foreign state is subject to jurisdiction when its instrumentality engages in commercial activity in the United States. The Court of Appeals for the D.C. Circuit ruled otherwise, relying on a reading of the FSIA that would restrict jurisdiction over the foreign state (distinct from the instrumentality) to cases where the foreign state uses the property at issue in the United States. In fact, that is only one of the two avenues provided by Congress to establish the necessary commercial nexus. The Court of Appeals' ruling to dismiss Germany conflicts, most importantly, with the plain text of the FSIA, as well as with decisions from other circuits and prior decisions of the D.C. Circuit. If the Court grants Defendants' petition to hear their appeal of the Court of Appeals' decision finding jurisdiction over the SPK, Plaintiffs respectfully request *certiorari* to resolve a circuit split and to correct an interpretation of this internationally significant statute.

I. The Court of Appeals' Decision Conflicts With the Statute's Text and the Circuit's Own Prior Precedent.

The expropriation exception requires a commercial nexus, and it sets forth two scenarios that each satisfy that mandate. There is a commercial nexus when the foreign state uses the subject property (or property exchanged for it) in the United States in connection with a commercial activity. There is also a commercial nexus when a state's agency or instrumentality owns or operates the property (or property exchanged for it) and that agency or instrumentality is engaged in a

commercial activity in the United States. The Welfenschatz has never been physically present in the United States, so the availability of the second prong is outcome-determinative as to jurisdiction over Germany.

In particular, the FSIA provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and [a] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; **or** [b] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a) (emphasis added). This is a classic disjunctive clause: it states that U.S. courts have jurisdiction over a case for property taken in violation of international law against a foreign state where either (a) or (b) is satisfied. The two commercial activity prongs are phrased explicitly in the alternative, both applicable to the foreign state as such.

Other Courts of Appeals have recognized that these two scenarios are equally valid ways to establish

the commercial nexus necessary to obtain jurisdiction over a foreign state. Under D.C. Circuit precedent, however, a plaintiff suing a foreign state can establish jurisdiction only by satisfying the first prong: the state's use of the property in the United States. This conflicts with the plain language of the statute. The relevant provision begins: "A foreign state shall not be immune," and it proceeds to explain the circumstances in which said foreign state is not immune. A foreign state is therefore not immune when "rights in property taken in violation of international law are at issue," and "that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.*

As Judge Randolph noted in dissent[3] in the case that dictated the outcome here: "Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit, the majority crosses out the 'not' and holds that

[3] It is worth acknowledging that both sides in this case cite to dissents in their respective petitions to this Court. Plaintiffs respectfully note a critical distinction: where Judge Katsas assailed the policy effect of the FSIA's limitations on sovereign immunity, that dissent had no response to the words of the law. By contrast, Judge Randolph discusses the FSIA simply as it is written, no more and no less, because the words of the commercial nexus test mean what they say. Judge Katsas's chief complaint was with what the FSIA *means*, a grievance that can only be addressed through the legislative process. Notably for this cross-petition, Judge Katsas wrote that with respect to the commercial nexus question, "The literal language could bear either meaning[.]" App. 101.

the foreign state shall be immune from suit when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States." *De Csepel v. Republic of Hung.*, 859 F.3d 1094, 1111 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 784 (2019). This treats the statute "as if it means the opposite of what it actually provides[.]" *Id.* Applying Judge Randolph's sound logic to the present case (substituting the parties in brackets), it is clear that Germany should not have been dismissed:

> Is [Germany] a "foreign state"? Of course it is. [ ] Are "rights in property taken in violation of international law" [the Welfenschatz] "in issue"? The answer is clearly yes. [ ] And is "that property" "owned or operated by an agency or instrumentality of the foreign state . . . [the SPK] engaged in a commercial activity in the United States"? Once again—yes. [ ]
>
> Yet the majority decides that [Germany] is immune from suit. . . .

Id. Perhaps most critically, Judge Randolph pointed out that *this* Court had then recently cited with approval the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (*see Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017), citing RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, § 455 (1987) (Tent. Draft No. 2, March 21, 2016)), which lays out specifically the test *for foreign states* in precisely the disjunctive construction that the Court of Appeals should have followed here:

> Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in property taken in violation of international law are in issue when
>
> (a) that property (or any property exchanged for such property) is present in the United States in connection with a commercial activity carried on by that foreign state in the United States; or
>
> (b) that property (or any property exchanged for such property) is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in commercial activity in the United States.

RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, § 455 (Tent. Draft No. 2, March 21, 2016).

The result in *de Csepel* broke with a sound analysis years earlier in *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008). In *Chabad*, the D.C. Circuit analyzed principally the second scenario of the commercial nexus test as applied to instrumentalities of the Russian Federation, rejected Russia's argument for a more demanding test for instrumentalities, and then also "reverse[d]" the District Court's "finding of Russia's immunity" in a case (like this) where the property had never crossed the borders of the foreign state but the instrumentalities in possession of it are engaged in commercial activity here in the United States. *Id.* at 947–48, 955. The oddity arose when the *Simon* court proceeded to revisit the

interpretation[4] of the commercial nexus prong, when arguably it should not have. *Sierra Club v. Jackson*, 648 F.3d 848, 854, 396 U.S. App. D.C. 297 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail."); *see also de Csepel*, 859 F.3d at 1114 (Randolph, J., dissenting) ("In the later decision in *Simon*, the panel recognized that the relevant portion of *Chabad* had precedential effect. Without explanation, it cited that precise portion in reaching its contrary and counter-textual interpretation of the expropriation exception."). *Simon* nonetheless accepted Hungary's argument (as adopted by Germany here), which *de Csepel* declared it was bound to follow. The *de Csepel* plaintiffs petitioned the D.C. Circuit for hearing, which was denied. *De Csepel v. Republic of Hung.*, No. 16-7042, 2017 U.S. App. LEXIS 19382 (D.C. Cir. Oct. 4, 2017). Now-Justice Kavanaugh and Judge Griffith filed notices that they would have granted rehearing *en banc*. *Id.* The Court of Appeals in *this* case then declared it was bound to follow *de Csepel*. Since *Chabad* had been the law of the circuit since 2008, however, it should never have come to this. Only this Court can now unwind this error, and Plaintiffs ask that the Court grant *certiorari* to allow that to happen.

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[4] The *de Csepel* majority ruled that *Chabad* had not, in fact, held that Russia satisfied the commercial nexus test, but the *Chabad* court could not have reversed the dismissal of Russia without reaching that conclusion.

II. *Certiorari* Is Needed to Address a Circuit Split on This Important Issue.

Justice for victims of takings in violation of international law as provided by Congress should not vary by circuit. Yet the D.C. Circuit's narrow reading of the expropriation exception's commercial nexus requirement has just that effect.

Multiple other circuits recognize that a foreign state is subject to jurisdiction when the second clause of the commercial nexus requirement is satisfied.[5] In the seminal case of *Altmann v. Republic of Austria*, the Ninth Circuit held that Austria was subject to jurisdiction under the second scenario:

> Altmann has satisfied the FSIA's statutory nexus requirement by showing that the paintings are owned or operated by an agency or instrumentality of the foreign state, here the Austrian Gallery, which is "engaged in commercial activity in the United States."

317 F.3d 954, 969 (9th Cir. 2002) (holding that the District Court properly exercised jurisdiction over claims against both the Republic of Austria and the Austrian Gallery).[6]

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[5] The D.C. Circuit's interpretation is shared by the Second Circuit. *See Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 205–06 (2d Cir. 2016) (discussing circuit split).

[6] This Court heard *Altmann* on writ of *certiorari* but did not reach the question of the applicability of the commercial nexus test to Austria. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The Ninth Circuit later reaffirmed its holding, explaining:

> Congress meant for jurisdiction to exist over claims against a foreign state whenever property that its instrumentality ends up claiming to own had been taken in violation of international law, so long as the instrumentality engages in a commercial activity in the United States.

Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1038 (9th Cir. 2010) (cert. denied June 27, 2011); *see also Sukyas v. Romania*, 765 Fed. App'x 179, 180 (9th Cir. 2019) (in a case against Romania and RADEF România Film, the commercial activities of RADEF România Film brought the "claims within the second commercial-activity nexus clause," and costs were taxed against both defendants).

The Seventh Circuit offered a similar explanation of the statute. It held: "To break that down, the expropriation exception defeats sovereign immunity where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 671 (7th Cir. 2012).

The Eleventh Circuit concurs. In *Comparelli v. Republica Bolivariana De Venez.*, the Eleventh Circuit explained that the expropriation exception requires that "at least one of the two statutory nexus requirements are satisfied." 891 F.3d 1311, 1326 (11th Cir.

2018) (case remanded for a determination of "whether the nexus requirement is, in fact, established; mere allegations are no longer sufficient."). A District Court of the Eleventh Circuit followed the same reasoning. *See Sequeira v. Republic of Nicar.*, No. 16-25052-CIV, 2017 U.S. Dist. LEXIS 121670, at *20 (S.D. Fla. Aug. 1, 2017) ("To satisfy the second scenario of the jurisdictional nexus test, the property must be owned or operated by an agency or instrumentality of the foreign state and that agency and instrumentality must be engaged in commercial activity in the U.S. The second scenario appears satisfied."). While the Fifth Circuit has not ruled on the issue, one of its District Courts has indicated that it will follow the majority interpretation. *Amorrortu v. Republic of Peru*, 570 F. Supp. 2d 916, 924 (S.D. Tex. 2008) (no jurisdiction over a sovereign state where, among other issues, the plaintiff "makes no allegation that the remaining property is owned or operated by an agency or instrumentality of the Republic of Peru that is engaged in a commercial activity in the United States.").

Under current law, plaintiffs in the Seventh, Ninth, and Eleventh Circuits have a meaningful path to justice against sovereign states that participated in the Holocaust. Plaintiffs in the D.C. and Second Circuits face a much higher—and even, as here, impossible—threshold to establish a commercial nexus that Congress did not intend.

III. Properly Applying the FSIA Is Necessary to Accomplishing Congressional Goals.

Properly applying the expropriation exception is necessary to effecting Congress's purpose in both the FSIA and the HEAR Act. The FSIA was enacted so that courts could determine "the claims of foreign states to immunity[.]" 28 U.S.C. § 1602. While its rules of immunity encompass instrumentalities and agencies (28 U.S.C. § 1603(a)–(b)), the FSIA's principle objective was to draw the lines of state immunity. The dismissal of Germany reverses an unambiguous Congressional decision.

Properly applying the FSIA is particularly important in light of Congress's commitment to providing justice to Holocaust victims and their heirs, recently strengthened through the HEAR Act. That law was passed to ensure that claims involving Nazi-looted art could proceed in the United States. The D.C. Circuit's misreading of the FSIA dulls the HEAR Act and bars precisely the kind of claims that the HEAR Act was intended to protect. The sovereigns ultimately responsible for wrongdoing should be parties to the suit.

CONCLUSION

Plaintiffs respectfully request that this Court grant their conditional cross-petition for *certiorari* to allow their suit to proceed against both the SPK and Germany.

Respectfully submitted,

NICHOLAS M. O'DONNELL
Counsel of Record
ERIKA L. TODD
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
(617) 338-2814
nodonnell@sullivanlaw.com

Counsel for Conditional Cross-Petitioners

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