No. 19-520

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

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO DEFENDANTS' ARGUMENTS

Plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber (together, "Plaintiffs") submit this Brief in Reply to the Brief in Opposition (the "Opposition") filed by Defendants Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz ("SPK"; together, "Defendants") to the Conditional Cross-Petition for Writ of *Certiorari* the ("Conditional Cross-Petition").

The Opposition's contortion of the applicable statutory definition of "a foreign state" in the Foreign Sovereign Immunities Act ("FSIA") would render the text of the expropriation exception nonsensical. Although the Conditional Cross-Petition precisely follows the statutory text, Defendants wrongly accuse Plaintiffs of confusing the relevant statutory terms. Defendants feign concern that their misstatement of Plaintiffs' argument—an argument that Plaintiffs do not make—could create a hypothetical outcome involving unrelated instrumentalities or political subdivisions of foreign sovereigns. These concerns are unwarranted. Indeed, Defendants fail even to raise this straw man high enough to knock it down, and their argument ironically bolsters Plaintiffs' position that 28 U.S.C. § 1605(a)(3) creates two ways to obtain jurisdiction over a foreign state, not separate tests for the foreign sovereign on the one hand and instrumentalities of a foreign state on the other. In addition, this Court has already ruled in *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba* that an instrumentality like the SPK that acquired the looted property from

the sovereign perpetrator is no shield to jurisdiction. 462 U.S. 611, 630–34 (1983).

I. The "Foreign State" That Is Not Immune When the Commercial Nexus Is Met Necessarily Means the Foreign State Itself.

The Opposition contends that 28 U.S.C. § 1605(a)(3) means that a foreign state shall not be immune when the foreign state uses the property at issue in the United States, and separately, that an instrumentality shall not be immune from suit when the instrumentality is engaged in any commercial activity in the United States. The obstacle to this reading is the statute's text, which begins "***A foreign state*** shall not be immune from the jurisdiction of courts of the United States or of the States in any case" for claims concerning rights in property, followed by two commercial nexus tests. If each test pertains to a different type of entity, then beginning the text with "A foreign state" would make no sense, which Congress could not have intended. To get around this, Defendants suggest in the Opposition[1] that that initial reference to "A foreign state" *actually* means the instrumentality. But that would render the distinct uses of the terms later in the same provision meaningless, and it would render a

[1] *See*, *e.g.*, Brief in Opposition to Conditional Cross-Petition for Writ of Certiorari ("Opposition"), 12 ("[B]oth foreign sovereigns and their agencies and instrumentalities qualify as 'foreign states' under the Act. . . .").

subsequent use of the term "foreign state" nonsensical and therefore not the intention of Congress.

A. Defendants' Interpretation Is Illogical.

In an attempt to define Germany out of the statute's reach, Defendants' Opposition fundamentally misdefines the term "foreign state" in the FSIA. The FSIA provides: "A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state[.]" 28 U.S.C. § 1603(a). The term "foreign state" necessarily and always includes the foreign state itself (here, Germany). Defendants urge that, in this case, however, the term "foreign state" should mean *only* the SPK, and the actual foreign sovereign (Germany) should be excised from that term. Opposition, 13 ("'[T]he statute is naturally read to require that the entity that loses its immunity (the "foreign state" in the introductory paragraph) must be the same entity whose commercial activities in the United States subject it to jurisdiction of a U.S. Court.'").

This construction would render the expropriation exception nonsensical. That exception creates jurisdiction when the subject property "is owned or operated by an agency or instrumentality of the foreign state" (28 U.S.C. § 1605(a)(3)), but the SPK is not "an agency or instrumentality of the [SPK]." An agency or instrumentality is *never* an agency or instrumentality of

itself.[2] If the expropriation exception is to have any coherent meaning, the term "foreign state" must mean the actual sovereign. *See Dep't of Hous. v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting construction that "would result in [a] nonsensical reading").

From here, the rest of the proper statutory construction falls into place. Identical statutory terms bear consistent meanings. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (acknowledging "the basic canon of statutory construction that identical terms within an Act bear the same meaning"). Therefore, when the term "foreign state" is used to discuss amenability to suit—"A foreign state shall not be immune . . . " (28 U.S.C. § 1605(a))—that term includes the actual sovereign: here, Germany, when the subsequent test for commercial activity by either the foreign sovereign *or* its instrumentality is met. Since the second commercial nexus test as to the SPK is met, neither Defendant is immune from suit.

B. Defendants Undermine Their Own Argument Throughout Their Brief.

Despite their argument otherwise, Defendants are well-aware that the term "foreign state" principally references the foreign sovereign itself. Defendants often treat the term "foreign state" as synonymous with "foreign sovereign," and they repeatedly contrast

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[2] As Defendants observe, a foreign state's instrumentality must be "a separate legal person, corporate or otherwise[.]" 28 U.S.C. § 1603(b) (quoted at Opposition, 10).

"foreign states" with mere instrumentalities and agencies. *See*, *e.g.*, Opposition, 10 ("The FSIA . . . treat[s] foreign states differently from their subordinate entities. . . ."); *id.* at 13 (discussing "the distinction between foreign states and their agencies and instrumentalities"); *id.* at 15 ("But the exceptions to immunity from execution are narrower for instrumentalities and agencies than for foreign states."); *id.* at 17 ("The Second Circuit in *Garb* did not have occasion to conclude that a foreign state cannot be subject to U.S. jurisdiction on the basis of commercial activity in the United States conducted by an agency or instrumentality of the foreign state."); *id.* at 18 ("To be sure, [the Ninth Circuit] has three times permitted the exercise of jurisdiction over a foreign state when only the second clause of the commercial-nexus requirement is satisfied."); *id.* ("But it [the Ninth Circuit] did not explain why its conclusion—that '*the Gallery* is engaging in commercial activity sufficient to justify jurisdiction under the FSIA'—satisfied the commercial-nexus requirement for Austria, the foreign state."); *id.* at 19 (asserting that plaintiffs in another case "never argued that the foreign state should face jurisdiction based on the commercial activities of its instrumentality"); *id.* at 25 ("the Court invited the Solicitor General to express the views of the United States on whether a foreign state is subject to jurisdiction under the expropriation exception based solely on the commercial activities of an agency or instrumentality in the United States.").[3]

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[3] Defendants also rely on 28 U.S.C. § 1610, which sets forth one execution provision for foreign states and another for agencies

It is clear that Defendants know exactly what the term "foreign state" means. It means, at a minimum, a foreign sovereign. (It may also include a related political subdivision, agency, or instrumentality.) When the FSIA provides that "a foreign state shall not be immune from . . . jurisdiction" when certain requirements are met, that means what it says: the foreign state—here, Germany—is not immune when either of the two commercial activity scenarios is satisfied.

II. A "Foreign State" Does Not Include Each and Every Instrumentality.

Defendants assert that using an instrumentality's commercial activities to establish jurisdiction over the foreign state would also mean that the commercial activities of any one instrumentality would create jurisdiction over every other instrumentality of the same sovereign, but this does not follow. Defendants claim:

> So if Germany is subject to jurisdiction as a "foreign state" because of SPK's commercial activity in the United States, so too (under Plaintiffs' reading) is Bavaria (a "political subdivision" of Germany) and the Bavarian owned Hofbräu brewery (an "agency" of Germany)—even if neither of these entities has a connection to the property at issue and even if

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and instrumentalities. Opposition, 15. That section does not help Defendants. Instead, it establishes that when the FSIA intended to set forth a different rule for foreign states than for instrumentalities, it did so clearly.

> neither have engaged in commercial activity in the United States.

Opposition, 14.

Once again, Defendants offer a conclusion based on contorting the definition of a "foreign state." For the SPK's actions to create jurisdiction over an unrelated brewery or a political subdivision like Bavaria, the FSIA would need to define "foreign state" as a foreign state and, at all times and for all purposes, all of the foreign state's political subdivisions, agencies, and instrumentalities. It does not.

Instead, as discussed above, "A 'foreign state' . . . includes . . . an agency or instrumentality of a foreign state[.]" 28 U.S.C. § 1603(a). The phrase "an agency or instrumentality of a foreign state" is also used for the expropriation exception's second prong, which applies when "such property is owned or operated by an agency or instrumentality of the foreign state." 28 U.S.C. § 1605(a)(3). It naturally follows that the "agency or instrumentality of a foreign state" subject to jurisdiction must be the same "agency or instrumentality of a foreign state" whose commercial activity satisfies the commercial nexus prong. Under the FSIA's plain text, there is no risk that one instrumentality's commercial activity will expose a separate instrumentality or other political subdivision to jurisdiction.

Moreover, Defendants are able to offer their ridiculous hypothetical only by ignoring the substance of this case. Plaintiffs allege that Nazis—agents of the German state itself—coordinated the forced sale of the

Welfenschatz from their family members, for a fraction of its true value, during and as part of the Holocaust. Supp. App. 2–7; 18–60. The Welfenschatz was presented to Hitler—the leader of the German state—as a "surprise gift." Supp. App. 6, ¶ 13. After Germany's defeat in World War II, it arranged for this plunder to be transferred to its instrumentality, the SPK. Supp. App. 62, ¶ 184. Plaintiffs did not sue Germany because its instrumentality happens to own disputed property. Plaintiffs sued Germany because Germany's own wrongdoing is at the core of this case.

By contrast, the Hofbräuhaus in Defendants' hypothetical neither stole nor currently possesses the Welfenschatz. "The FSIA is purely jurisdictional; it doesn't speak to the merits or to possible defenses that may be raised to cut off stale claims or curtail liability." *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1031 (9th Cir. 2010). Plaintiffs have no substantive claim against the Hofbräuhaus, which had no involvement with the Nazis' taking and has no involvement with the SPK's refusal to restore the Welfenschatz to its rightful owners. Germany's other instrumentalities that do not possess Nazi-looted property have no risk of facing suit under the expropriation exception as a result of their sovereign's perpetration of the Holocaust.

III. Defendants' Interpretation Would Incentivize the Creation of Sham Instrumentalities to Escape Responsibility for Genocide.

As noted in the Conditional Cross-Petition, the plain text of the FSIA resolves the basis on which the Court of Appeals erroneously dismissed Germany as a party. One of Defendants' own cited cases further emphasizes why Plaintiffs' is the correct interpretation.[4] In *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, this Court considered whether to disregard the separate status of a particular instrumentality. 462 U.S. 611 (1983). The Court held: "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises." *Id.* at 633. Although there is no question in this case of collapsing the distinction between Germany and the SPK, the same policy concerns explain why Germany must not be allowed to "escape liability for acts in violation of international law simply by [its transference] of the assets to [a] separate juridical entit[y]."

The factual allegations in the First Amended Complaint prove the point. Once Hitler ascended to power,

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[4] Defendants attempt to minimize the circuit split on this issue, but their characterizations do not refute the existence of that split, which is surely more substantial than the outlier Seventh Circuit opinion on which Defendants' underlying Petition is based in part.

persecution of German Jews—such as Plaintiffs' family members—was the official policy of the German Reich. Supp. App. 5, ¶ 10. Hermann Goering, one of the most notorious war criminals of the Nazi era, acted swiftly on that policy; among his countless other crimes, he persecuted the Consortium and forced its members to sell the Welfenschatz as part of the Holocaust. Supp. App. 2–7; 18–60. The relentless pursuit of the Welfenschatz involved support from a wide array of accomplices, including directors of several state museums and the Dresdner Bank. Supp. App. 35, ¶ 79. When the plot succeeded, Goering presented the Welfenschatz to Hitler himself. Supp. App. 6, ¶ 13. After the war, Germany—the foreign state—transferred the Welfenschatz to the newly-created SPK. Supp. App. 62, ¶ 184. That transfer does not allow Germany to "escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities," however. *First Nat'l City Bank*, 462 U.S. at 633. To hold otherwise would incentivize the culpable foreign state to transfer the property it took in violation of international law to a new juridical entity to avoid jurisdiction. This Court has already said that it may not.

Nor do Defendants' policy arguments provide a reason to ignore statutory language.[5] Agencies and

[5] In support of their policy arguments, which require reversing statutory language, Defendants rely at length on briefs by members of the executive branch. Opposition, 21–25. As the petitioners in *de Csepel v. Republic of Hung.* wrote regarding a similar argument, the view of the executive branch "neither erases the district court conflict nor fixes the analytical errors in the decision

instrumentalities have separate status for their *own* protection—not to shield a sovereign state. *See id.* at 624–25 ("These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies."); *id.* at 626 ("Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee."). Defendants' policy arguments, which are imported from an entirely different context, provide no basis for excusing Germany from liability in a suit about its own wrongdoing.

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below." Reply Brief for Petitioners at 5, *de Csepel v. Republic of Hung*. (No. 17-1165); *see also id.* at 6 ("In any case, one of the principal purposes of the FSIA was to 'transfer[ ] from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit.' ") (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016)). In any event, Defendants presume too much in claiming to know why the Court did not take a particular case.

CONCLUSION

For these reasons, and for the reasons previously stated, Plaintiffs respectfully request that this Court grant the Conditional Cross-Petition.

Respectfully submitted,

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