

No. 19-351

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IN THE  
**Supreme Court of the United States**

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FEDERAL REPUBLIC OF GERMANY, *et al.*,

*Petitioners,*

*v.*

ALAN PHILIPP, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE D.C. CIRCUIT

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**BRIEF OF *AMICI CURIAE* HOLOCAUST  
AND NUREMBERG HISTORIANS IN  
SUPPORT OF NEITHER PARTY**

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**INTEREST OF *AMICI CURIAE***

*Amici curiae* are academic specialists on the history of the Holocaust period, which ran from January 30, 1933 through at least May 9, 1945, and the Nuremberg trials following World War II, which considered extensive evidence relating to the Holocaust—including the period from January 1933 through June 1935 that is relevant to this case. *Amici* have an important interest in ensuring that the historical issues presented are understood fully and comprehensively, including so as to prevent misunderstandings and distortions of Holocaust history.<sup>1</sup> *Amici* include:

Peter Hayes (Ph.D., Yale) is Theodore Zev Weiss Holocaust Educational Foundation Professor Emeritus, Northwestern University. Author or editor of thirteen books, including monographs on two large German chemical companies, IG Farben and Degussa, during the Nazi era: *The Oxford Handbook of Holocaust Studies*, and *Why? Explaining the Holocaust*. Chair of the Academic Committee of the United States Holocaust Memorial Museum, 2014-19.

Omer Bartov (Ph.D., Oxford) is John P. Birkelund Distinguished Professor of European History, Brown University. Author or editor of thirteen books, primarily on the histories of Nazi Germany and the Holocaust,

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1. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or its members made a monetary contribution to the 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.

including studies of the behavior of the German army, issues of memory and representation, and events in Polish Galicia.

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Claudia Koonz (Ph.D., Rutgers) is Peabody Family Professor of History Emerita at Duke University. Author or editor of numerous works on the history of women and Nazi ideology, notably *Mothers in the Fatherland* and *The Nazi Conscience*.

Dan Michman (Ph.D., Hebrew University, Jerusalem) is Emeritus Professor of Jewish History and former chair of the Finkler Institute of Holocaust Research, Bar-Ilan University, Israel, and Head of the International Institute for Holocaust Research and John Najmann

Chair of Holocaust Studies, Yad Vashem. Author or editor of twenty-five books and numerous articles on the Holocaust, especially concerning historiography and conceptualization, the ghettos, and Western Europe, including the role of economic persecution.

Jonathan Petropoulos (Ph.D., Harvard) is John V. Croul Professor of European History at Claremont-McKenna College. Author or editor of eight books, including four studies of the art trade and world in Nazi Germany.

Nikolaus Wachsmann (Ph.D., London) is Professor of Modern European History at Birkbeck College, University of London. Author or editor of numerous works on modern German history, among them five books on Nazi prisons and concentration camps, including the multiple prize-winning, *KL: A History of Nazi Concentration Camps*.

*Amici* respectfully submit this brief to provide a precise and historically accurate context for assessing how the Holocaust—the comprehensive persecution and genocide of the Jews—unfolded between 1933-1935, especially with respect to Jews in business, and particularly in the art market in Germany. This brief is intended to correct misimpressions in other briefs filed in this case relating to how the Holocaust developed in Germany, specifically in the period between January 1933 and June 1935 (when the Welfenschatz was sold). The history of the persecution of Jews in Germany prior to June 1935 amply demonstrates why the period of the comprehensive anti-Jewish campaign was defined at the Nuremberg trials as beginning with Hitler's appointment as Chancellor on January 30, 1933. *Amici* take no side on the statutory issues of foreign sovereign immunity

presented, and have no stake in the present litigation, and therefore submit this brief in support of neither party. Their motive is entirely that of historical accuracy with respect to the history of the Holocaust.

### **SUMMARY OF ARGUMENT**

The history of the persecution of Jews in Germany prior to June 1935 amply demonstrates why the period of the comprehensive anti-Jewish campaign was defined at Nuremberg as beginning with Hitler's appointment as Chancellor on January 30, 1933. Upon Hitler's accession on January 30, 1933 through the time of the Welfenschatz sale in June 1935, the Nazi movement and state pursued policies that made the continued existence of Jews in Germany increasingly impossible. As a matter of historical record, German Jews, including the Consortium members, ceased to possess the full and equal rights of German nationals—and were viewed and treated increasingly as aliens and strangers in their own land.

Well before the infamous Nuremberg Laws of September 1935, German Jews were systematically stripped of legal and economic rights normally associated with citizenship. Even before they were rendered officially stateless, Jews faced growing statelessness via a creeping curtailment of legal and property rights, and from early-1933 to mid-1935, the Nazi regime steadily and comprehensively infringed upon a dizzying array of German Jews' livelihoods and everyday activities.

In addition, Jewish businesses and assets were targeted for forced sale at less than full value. Property theft and appropriation were not tangential or opportunistic in the Nazi program. Rather, as proven at Nuremberg

and overwhelmingly confirmed by the historical record, they were central to the ultimate purpose of making it impossible for German Jews to continue living in Germany. Market manipulation and forced sales also were common in the German art market between 1933 and 1935. In the words of Raul Hilberg, such transfers occurred “in pursuance of ‘voluntary’ agreements between Jewish sellers and German buyers . . . . The word ‘voluntary’ belongs in quotation marks because no sale of Jewish property under the Nazi regime was voluntary in the sense of a freely negotiated contract in a free society.” Raul Hilberg, *The Destruction of the European Jews* 92 (2003).

Thus, during the period between January 1933 and June 1935, the Nazi regime was taking concerted steps to destroy the social and economic rights and freedoms of German Jews and to make their continued presence in Germany increasingly unbearable. This is true if viewed generally, in terms of any Jewish person’s ability to exercise social and economic rights, and is also true if viewed specifically in terms of a Jewish art dealer’s ability to operate freely in an open and fair market free of coercive pressures. This period is inextricably related to the genocide we call the Holocaust. To depict prevailing conditions at the time of the Welfenschatz sale as allowing Jewish sellers to stand on equal footing with non-Jewish buyers in negotiations is an affront to the historical record.

Finally, *Amici* note that various drafters of the U.N. Genocide Convention, taking account of the findings at Nuremberg, viewed Germany’s program of economic destruction as to German Jews as falling within the understanding of genocide expressed in Article 2(c) of the Genocide Convention.

## ARGUMENT

From the moment of Adolf Hitler's appointment, Nazi activists and officials at the national, regional, and local levels were intent on reducing the livelihoods and indeed the number of Jews in Germany as a first step toward implementing the Nazi Party's declared desire to "remove" Jews' "influence" from German life. Efforts to this effect increased inexorably albeit unevenly for fear of impairing Germany's recovery from the Depression and international standing. These efforts included intimidation through widely publicized acts of violence against individuals, as well as exclusion of Jews from whole categories of employment and economic activity. Such forms of discrimination and harm were extensive *prior to the time* when the Nazi State stripped Jews of most citizenship rights shortly after the sale of the Welfenschatz in 1935, let alone by the time the regime's hateful goals metamorphosed in 1941-42 into the "final or total solution to the Jewish question," namely the mass murder of all Jews within reach. As a result, a presumption of duress, either implicit or explicit, attaches to any property transfer entered into by a Jew in Germany after Hitler's appointment as Chancellor on January 30, 1933.

When historians teach courses or write books on the mass murder of the European Jews by Nazi Germany, the events usually referred to as the Holocaust, they often begin by tracing the origins and fluctuations of long-standing hatred toward Jews in Europe. But the true onset of the narrative is 1933, the moment when a political party deeply committed to this hatred acquired power, and the account that unfolds is one in which Nazi intentions to "remove" Jews' "influence" escalated into a comprehensive program to "annihilate" their very existence anywhere within reach

of the Third Reich. Although the transformation of Nazi anti-Jewish policy was gradual, halting, and marked by milestones along the way—*e.g.*, the Boycott of 1933, the Nuremberg Laws, the “Kristallnacht” pogrom, and the Wannsee Conference—the general direction toward ever more complete and violent exclusion of the Jews was set from the beginning of Nazi rule and included an emphasis on economic *Entjudung* (“dejewification”). What Nazi leaders considered necessary and achievable in defending the German nation from a relatively small population of German Jews in 1933-35 (as Germany sought to recover from the Depression and to rearm) was less extreme than what seemed required and attainable in dealing with millions of Jews in territories occupied by 1941-42 (as Germany fought a world war on multiple fronts). There is no doubt, however, that the initial measures were indispensable steps toward genocide and inseparable from it.

**I. THE NAZI REGIME’S EFFORTS TO INFLICT CONDITIONS INTENDED TO BRING ABOUT THE DESTRUCTION OF GERMAN JEWRY WERE WELL UNDERWAY BETWEEN 1933 AND 1935**

**A. The Nazi Party was intent on removing Jews from German society long before taking power.**

As the Nuremberg Tribunal found, the intents and desires of the Nazi Party were clear well before Hitler’s rise to power in 1933. *United States, et al. v. Goering, et al.*, 6 F.R.D. 69, 78 (Int’l Military Trib. at Nuremberg 1946). In February 1920, Hitler announced the platform of the Nazi Party. Point 4 of the platform stated “[o]nly a racial comrade can be a citizen. Only a person of German blood, regardless of religion, can be a racial comrade.

Thus, no Jew can be a racial comrade.” *Die Ziele der Nationalsozialisten aus dem Programm der NSDAP* (Feb. 24, 1920), [www. documentarchiv.de/wr/1920/nsdap-programm.html](http://www.documentarchiv.de/wr/1920/nsdap-programm.html) (translation by *Amici*).

Other points in the Nazi Party program declared that Jews should be treated as foreigners, that they should not be permitted to hold public office, that they should be expelled from the Reich if it were impossible to nourish the entire population of the State, that they should be denied any further immigration into Germany, and that they should be prohibited from publishing German newspapers. *Id.* The Nazi Party preached these doctrines throughout its history. *Der Stürmer*, its scurrilous tabloid, *Der Völkischer Beobachter*, its daily propaganda organ, and other publications disseminated hatred of Jews, and the speeches and public declarations of the Nazi leaders held Jews up to public ridicule and contempt. *See Goering*, 6 F.R.D. at 162. Thus, the Nuremberg Tribunal dated the “Common Plan or Conspiracy” of the Nazis as lasting 26 years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. *Id.* at 111. The persecution of the Jews was included within the indictment as part of that conspiracy. *Id.*

Petitioners appear to claim that the Welfenschatz sale cannot relate to a “genocide” because (i) the Consortium purchased the Welfenschatz as the Depression was setting in and any price ultimately negotiated principally reflected economic conditions as the crisis was winding down; (ii) the Consortium—as other German nationals—was free to bargain over price; (iii) genocide has only to do with violence like murder, torture, and physically



cruel and inhumane treatment of people; (iv) genocide is not “a property offense”; (v) the property at issue was not essential for life—like food or medicine; (vi) none of the Consortium members died due to the sale of the Welfenschatz. *See* Brief for Petitioners 36-37.<sup>2</sup> *Amici* are not opining whether, as a matter of international law, genocide is limited to crimes of violence or may never include matters of “non-essential” property, nor do *Amici* opine on how genocide may relate to expropriation.

Rather, *Amici* show below that, as of Hitler’s accession on January 30, 1933 through the time of the Welfenschatz sale, the Nazi movement and state pursued policies that made the continued existence of Jews in Germany increasingly impossible. As a matter of historical record, German Jews, including the Consortium members, ceased to possess the full and equal rights of German nationals—they were viewed and treated increasingly as aliens and strangers in their own land. The purpose of the Nazi regime in treating German Jews this way was to make continued life for them in Germany intolerable. *See* Dan Michman, *Economic Entjudung in Nazi Europe, 1933-1945: Its Place in the Overall Nazi Antisemitic Enterprise*, in *Geschichte erforschen – Geschichte vermitteln* 207-34 (Martina Sochin d’Elia & Fabian Frommelt eds. 2017).

*Amici* also note that various drafters of the United Nations Convention on the Prevention and Punishment

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2. To the same effect, *see* Pet. for Cert. 7, 17. The brief for the United States at the cert stage appears to refer to the events unfolding in Germany during 1933-35 only as “alleged genocides.” Br. for the United States as *Amicus Curiae* 14; *see also id.* (asserting that the alleged taking here does not fall under international law because the Consortium members still maintained German citizenship in 1935).

of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045 (“Genocide Convention”), taking account of the findings at Nuremberg, viewed Germany’s program of economic destruction as to German Jews as falling within the understanding of genocide expressed in Article 2(c) of the Genocide Convention, as discussed in Section II, *infra*.

**B. Upon taking to power in 1933, the Nazis immediately began to sow fear and terror in the German Jewish community.**

Within weeks of Hitler’s accession, Jews were being terrorized around Germany, and word of that was broadly circulating in society. The terror, including random arrests, beatings, and constant harassment, constituted a veritable campaign to “encourage” and ultimately compel German Jews to flee the country. *See, e.g.,* David Cesarani, *Final Solution: The Fate of the Jews 1933-49* 118 (2015) (“[B]lackmail and threatening letters proliferated.”).

This terror against Jews included unlawful detention in concentration camps set up all over Germany in 1933. Jews were significantly more likely than the average German to be forced into these camps and faced brutal antisemitic abuse. At Dachau, which would become a model for later SS camps, at least eight of the twelve prisoners murdered in the first weeks were of Jewish descent. *See* Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* 43-44, 52-56 (2015).

Two of the three dealers of the Welfenschatz were located in Frankfurt. In March 1933, the Osthofen camp was opened nearby in a confiscated former paper mill. Between 1933-34, it housed at least 119 Jewish prisoners,

among them the mill's chief manager. Within the camp, Jewish prisoners were often singled out for abuse; some were forced to clean latrines with their bare hands or food tins and subjected to physical violence. See Kim Wunschmann, *Before Auschwitz: Jewish Prisoners in the Prewar Concentration Camps* 46-49, 69-76, 81-82 (2015); Hans-Georg Meyer & Kerstin Roth, *Zentrale staatliche Einrichtung des Landes Hessen: Das Konzentrationslager Osthofen in Instrumentarium der Macht* 190, 206-208 (Wolfgang Benz, Barbara Distel eds. 2003).

This early Nazi campaign of terror was open and notorious. For example, processions of prominent prisoners were paraded through streets lined with spectators to nearby and newly-created concentration camps. Wachsmann, *KL* at 64-65. Many of the early camps—often located in the middle of German towns—were unconcealed spectacles of degradation and abuse. Screams and shots could be heard in the night, and guards boasted of torture and even murder. *Id.* at 65. As a result, news spread across Germany about crimes in local camps, and articles appeared in foreign newspapers describing the “shocking” appearance of prisoners. *Id.* at 65-71. If Jews dared to protest against the prevailing viciousness, they were prosecuted and sentenced to months in jail by Special Courts set up by the Nazi authorities, including in Frankfurt. See Wolf Gruner, *Defiance and Protest: A Comparative Micro-Historical Re-Evaluation of Individual Jewish Responses towards Nazi Persecution*, in *Micro-Histories of the Holocaust* 213 (Claire Zalc & Tal Bruttman eds. 2017).

At the same time, Jews also began to experience “social death” as social, political, and business organizations in Germany began to exclude Jews or “Aryanize.”

Many organizations ‘Nazified,’ even before the government officially required them to do so. Some examples include the German Chess League, the Association of the Blind, the Teacher’s Association, the German Association of Pharmacists, and the German Automobile Club. Moreover, where organizations did not formally ban Jews, they were often made unwelcome by individuals; they simply made clear that Jews were no longer considered a member of the association, and the Jewish person withdrew. As Hannah Arendt wrote, “Our friends Nazified (*gleichschalteten*) themselves! The problem . . . after all, was not what our enemies did, but what our friends did.”

Marion Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* 43 (1996).

The purpose of this terror campaign was to make Jews aware of their utter vulnerability. “Citizenship” was a pointless defense for Jews being made to understand that they no longer actually had the rights or freedoms of ordinary Germans—a precursor to being completely severed from German life.

The effectiveness of this campaign is well-documented. By June 1935, when the sales contract for the Welfenschatz was signed, roughly 83,000 German Jews had fled the country—about 17% of their total number when Hitler

came to power. Those included Jews from Frankfurt, among them members of the Consortium that owned the Welfenschatz, as well as the family of Otto Frank (Anne's father). See Debórah Dwork & Robert Jan van Pelt, *Flight from the Reich: Refugee Jews, 1933-1946* 17-18, 92 (2009).

**C. From 1933 to 1935, the Nazis increasingly curtailed Jews' livelihoods and legal rights.**

In addition to widespread acts of terror, Jews also began to experience their formal removal from positions of political and economic authority. Nazi authorities at national, regional, and local levels played two roles in this process: Government agencies instituted discriminatory policies that deprived German Jews of economic and business rights and many of the freedoms accorded to other Germans. Those discriminatory government actions, in turn, created an atmosphere of impunity, encouraging Nazi paramilitaries and other zealots to take actions that compounded discrimination against Jews and their businesses.

Well before the infamous Nuremberg Laws of September 1935, German Jews were systematically stripped of legal and economic rights normally associated with citizenship. Even before they were rendered *officially* stateless, Jews faced growing statelessness via a creeping curtailment of legal and property rights. The process started on April 1, 1933, when an economic boycott targeting Jewish-owned businesses and the offices of Jewish professionals was staged. Then followed a law purging all Jews from the civil service, including courts of law and public hospitals (except those individuals who held their positions before World War I and had served in the army during that conflict, or had a father or son

who died while doing so). The effect was to erode the existing legal equality of Jews in Germany and to herald “the step-by-step revision of their emancipation.” Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* 38 (2010).

In quick succession, the Nazi State then moved to denaturalize Jews who had become citizens since 1914; to exclude Jews from cultural institutions, including theaters, orchestras, and publishing houses; and to restrict the share of Jews in German secondary schools and universities—set at 1.5% of total enrollments. In February 1934, Defense Minister Werner von Blomberg applied the civil service exclusions to the German military, and on May 21, 1935, he completed Jewish exclusion from the military by abolishing the exceptions listed above. See Peter Hayes, *Why? Explaining the Holocaust* 76 (2017); Saul Friedländer, *Nazi Germany and the Jews: Volume I: The Years of Persecution, 1933-1939* 117 (1997).

The exclusion of Jews from government posts ran parallel to the removal of Jews from fiduciary or management positions within German companies. Beginning in early 1933, Jewish members of supervisory and management boards of major corporations were forced out of their jobs on a massive scale. Between January 1933 and mid-1934, among the 20 largest firms in each of 15 economic sectors in Germany, 57% of the Jewish managing board (*Vorstand*) members were forced to retire or resign, along with 50% of the supervisory board (*Aufsichtsrat*) members; by mid-1935, even more had been excluded. See Martin Münzel, *Die jüdischen Mitglieder der deutschen Wirtschaftselite 1927-1955: Verdrängung—Emigration—Rückkehr* 179-83 (2006).

In the spring of 1933, Karstadt, a leading German department store, provided a striking illustration of the vulnerability of German Jews to the rapid onset of Nazi persecution. Between March 28 and April 1, even before the above-mentioned boycott, Karstadt dismissed the four Jews on its seven-member managing board, six Jews from its supervisory board, and about 45 branch managers and chief buyers. In the ensuing weeks, the Nazi Party drove 1,200 Jewish employees out of the company's operations all across Germany. See Rudolf Lenz, *Karstadt: Ein deutscher Warenhauskonzern 1920-1950* 143, 154-55, 176-83 (1955). These and similar dismissals were possible because of a series of German Labor Court (*Arbeitsgericht*) decisions in late April and early May 1933. Those decisions held that firms could abrogate labor contracts with Jewish employees whenever an employer had reason to believe that production or sales would be endangered by inaction—in other words, reason to fear that Nazis would disrupt or vandalize a place of business if Jewish employees continued to be employed. See *Jüdische Rundschau*, nr. 49 (June 20, 1933) (reporting the decisions of April 27 and May 2, 1933). These decisions exposed Jewish employees to loss of livelihood simply on “racial” grounds.

Numerous other restrictions were imposed prior to mid-1935 in order to undermine Jewish-owned businesses in Germany. For example, Jewish business names were deleted from state published handbooks and listings, and the post office started refusing to accept ads for Jewish-owned firms in telephone books. Christoph Kreutzmüller, *Final Sale in Berlin: The Destruction of Jewish Commercial Activity 1930-1945* 152 (2015). Jews also could no longer rent space in government-owned buildings and existing rental agreements were cancelled. *Id.* Other

restrictions followed, with Jews excluded from the Berlin stock exchanges, forbidden to use the word “German” in the names of their firms, and banned from receiving new licenses to establish and operate pharmacies. *Id.* at 153, 156-57, 160, 162.

Between early-1933 and mid-1935, the Nazi regime (including a broad array of state and local authorities and professional associations) steadily and comprehensively infringed upon German Jews’ livelihoods and a dizzying array of everyday activities. The actions listed below illustrate the breadth of the restrictions that took effect *before* the sale of the Welfenschatz, *i.e.*, during the time when the respondent’s predecessors were allegedly “free” to bargain and negotiate a fair price—or to not sell at all:

- ***Bans relating to Employment or Professional Membership:*** Jews (or “non-Aryans”) were banned from employment at the German National Railway; Jews could not serve in the military; Jews could not participate in professions tied to membership in professional associations including any teachers’ association, the German Pharmacists’ Association (and ultimately, the Reich Interior Ministry forbade Jews from taking the pharmacists’ qualifying exam); Jews were excluded from German sports associations, the German Automobile Association, the German Chess League, and the German Singers’ League; Jewish doctors and dentists could not seek payments from the national insurance system; Jews could not take the licensing exam to be veterinarians unless they had participated in the national labor service—from which Jews were excluded; and Jews were banned outright



from a growing list of professions including filmmaking, acting, teaching dance, serving on fire brigades, editing a newspaper or magazine, selling newspapers or magazines in certain cities (including Frankfurt), or being a midwife, masseuse, or worker in a welfare organization.

- ***Bans relating to Education:*** Jews in many parts of Germany were barred from studying medicine or dentistry and from being teachers, instructors or private tutors; Jews could not receive doctoral degrees unless they renounced their German citizenship; Jews were banned from the Technical Institutes at Leipzig and Dresden; Jewish religious schools in Prussia lost all state funding; in Bavaria, Jewish youth groups could no longer get reduced travel fares for group events; and no Jewish religious schools could be established that did not prepare students for emigration.
- ***Bans relating to Law:*** Jews were prohibited from taking bar exams; Jews could not act as expert witnesses in Prussia; Jews could not belong to law partnerships with non-Jews, serve as jurors; appear before the Reich Ministry of Finance in tariff or tax matters, and be participants in cases before Arbitration or Labor Courts; Jewish schools, religious and charitable organizations lost their tax abatements or exemptions (which were available to Christian organizations).
- ***Bans relating to Marriage:*** The Chancellor and Reich Ministries of Interior and Finance banned any civil servant married to a Jew from any form of public or civil service; any married couple that

included a Jew became ineligible for government marriage loans; no recipients of government marriage loans could use them to buy from Jewish sellers; and the Reich Defense Ministry required all brides of soldiers to prove Aryan descent.

- ***Random acts aimed at disrupting Jewish life:***

In April 1933, the Police President in Breslau stripped all Jews of their gun licenses; in May 1933, the Gestapo in Munich ordered the closing of all Jewish associations in the city and the seizure of their property; in July 1933, the Commander of the Political Police in the Bavarian Ministry of the Interior ordered a search of all business offices and residences of Jewish organizations for evidence of “activities against the state”; in August 1934, the Bavarian Ministry of the Interior forbade the speaking Hebrew or Yiddish at cattle markets; in February 1935, the Secret State Police Office (Gestapa—a predecessor of the Gestapo that concentrated on public information) declared that “all Jewish gatherings in which propaganda is made for Jews to remain in Germany are to be banned immediately” and also forbade Jews to raise the swastika flag or the black-white-red banner of the former German Empire at homes or businesses (as other German families were doing to show loyalty); in February 1935, the Gestapa office in Karlsruhe banned all Jewish gatherings that advocated for Jews remaining in Germany, but exempted Zionist meetings “because the Zionists encourage emigration”; and in May 1935, the Gestapa decreed that “every public activity of assimilationist organizations that advocate Jews remaining in Germany is to be banned.”

See Joseph Walk, *Das Sonderrecht für die Juden im NS Staat* 13-22, 25-26, 39-49, 54-68, 73-94, 98-100, 105-07, 117 (2013).

**D. Jewish businesses and assets were targeted for forced sale at less than full value.**

Property theft and appropriation were not tangential or opportunistic in the Nazi program. Rather, as proven at Nuremberg and overwhelmingly confirmed by the historical record, they were central to the purpose of making it impossible for German Jews to continue living in Germany.

From the outset of the Nazi regime, Jewish businesses and assets were subjected to pressure to sell to “Aryans” at under market value. See Richard Z. Chesnoff, *Pack of Thieves: How Hitler and Europe Plundered the Jews and Committed the Greatest Theft in History* 8-9 (2001); Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany* 27 (2000). The harrassers’ methods ran the gamut from gangster-like personal threats or property damage by Party zealots, to investigations for supposed tax evasion or violation of foreign currency controls, exclusions from government contracts, bans on patronage by civil servants or recipients of public assistance, and even asset freezes issued by Nazis in official positions. See Hayes, *Why? Explaining the Holocaust* at 77-78.

Another common way to drive Jewish business owners to sell their property—*i.e.*, engage in forced sales—was to exclude them from markets that the government could control. Two examples of such takeovers involved buyers

in Frankfurt, both showing how political pressure from the Nazi State could exert coercive pressure on Jews. Both sales took place at nominally “negotiated” and “reasonable” prices that postwar restitution proceedings judged exploitative.

In 1933, Chemisch-Pharmazeutische Werke AG, a manufacturer of medicinal preparations, was led by a Jew named Arthur Abelmann, who also owned the firm that controlled a majority of the stock in the corporation. After two Nazified doctors’ associations insisted that public hospitals cease to buy from the firm, its revenues plunged that March. The Jewish owner went in search of a non-Jewish partner to buy a majority of his shares. Within a few months, he concluded that Nazi antisemitism was so strong that he would have to sell out entirely and leave the country, which he did in August. He got the full book value for his firm, but the sale was neither voluntary nor fair. Accordingly, the postwar restitution proceedings imposed a substantial compensatory payment on the buyers, Degussa and IG Farben. Peter Hayes, *From Cooperation to Complicity: Degussa in the Third Reich* 77-79, 106-07 (2004).

The second case concerned Degea AG, a leading maker of electric bulbs and a company owned by Alfred Koppel, who was of Jewish descent, that did a large portion of its business with the German Defense Ministry. Faced, like Abelmann, with a loss of orders, Koppel at first sought a non-Jewish partner to take a majority stake but leave him with a minority interest and managerial responsibility. Like Abelmann, he soon discovered that political pressure made this objective untenable and he decided to sell in full, which he did at his stock’s market value at the time.

That sum, however, was well below the asset value of the enterprise, and after the war the buyer (Degussa) had to pay another substantial restitution settlement. Once again, a sale that appeared to have occurred at the seller's request and a nominally appropriate price was shown to have been coercive and unduly favorable to the buyer as a result of market conditions created by Nazi actions. *Id.* at 79-83, 107.

According to two contemporary estimates, “a total of some 20 to 25 percent of all Jewish businesses [in Germany] had either been liquidated or transferred to ‘Aryan’ hands by the middle of 1935”—that is, by the time of the Welfenschatz sale. Avraham Barkai, *From Boycott to Annihilation: The Economic Struggle of German Jews 1933-1943* 70 (1989). While such transfers occurred “in pursuance of ‘voluntary’ agreements between Jewish sellers and German buyers . . . [t]he word ‘voluntary’ belongs in quotation marks because no sale of Jewish property under the Nazi regime was voluntary in the sense of a freely negotiated contract in a free society.” See Raul Hilberg, *The Destruction of the European Jews* 92 (2003).

**E. Market manipulation and forced sales were common in the German art market between 1933 and 1935.**

Well before the Welfenschatz sale in mid-1935, every Jewish art or antiquities dealer knew that s/he could be excluded from the trade at a moment's notice by the Reich Chamber of Figurative Arts (*Reichskammer der bildenden Künste*) on grounds of “unsuitability.” See Christine Fischer-Defoy & Kaspar Nürnberg, *Gute Geschäfte: Kunsthandel in Berlin 1933-1945* 12 (2011).

The legal framework that legitimated expropriation of art from Jews came into being in 1933. As early as July 10, the Minister President in Hanover wrote to the Prussian Minister for Economics and Labor advocating the imposition of new qualifications for auctioneers in order to “remove the unclean elements,” referring to Jews. *Id.* at 131. On July 14, the Law for the Revocation of Naturalization and the Non-Recognition of German Citizenship, and the Law Concerning the Seizure of Property Opposed to the People and the State legalized the confiscation of art collections. After August 7, the Law to Eliminate Abuses in Auctioneering, supposedly designed to protect against false attributions and excessive pricing, became an excuse to investigate and interfere with the business of Jewish auctioneers. *Id.* at 120. Propaganda Minister Joseph Goebbels then declared on February 7, 1934 that Jews were categorically unfit to administer Germany’s cultural property, and thereafter the number of “non-Aryans” excluded from the Reich Chamber of Figurative Arts steadily rose. *Id.* at 124-25.

On August 4, 1934, the First Order to Protect the Profession and the Activity of Art and Antiquity Dealers excluded all Jews from the business except those granted exemptions (usually people who produced sales in foreign currency, which Germany needed), thus creating the possibility of a firm being terminated by order at any time. *Id.* at 120. The Law on the Auction Trade of 16 October 1934 then made participation in the art trade contingent on membership in the Reich Chamber of Culture, which could be withdrawn at any time. *Id.* at 12. In the aftermath of that law (and subsequent orders issued through February 1935), pressure on Jewish art sellers mounted while the ability of Jews to serve as auctioneers or owners of auction

houses steadily dwindled—precisely as the sale of the Welfenschatz was moving toward conclusion. *See id.* at 120, 131.

Every dealer knew of important confiscations and forced sales. *See* Inka Berz & Michael Dorrman, *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis Heute* 71, 76-77 (2008). “After January 30, 1933 the emigration wave of the Jewish population began. The most renowned Jewish galleries also gave up or were forced to do so.” Fischer-Defoy & Nürnberg, *Gute Geschäfte* at 18. For example, Alfred Flechtheim, a famous Jewish dealer in modern art, had his gallery in Dusseldorf “aryanized” on March 30, 1933 by his former colleague Axel Vömel, and fled to Basel, then Paris, and finally at the beginning of 1934 to London. His Berlin gallery was taken over by Alfred E. Schulte as general manager in November 1933. It was liquidated in January 1936. *Id.* at 39. After Nazi Party stormtroopers blocked their entrance on April 1, 1933, Israel Ber Neumann sold his half of the Neumann-Nierendorf Gallery in Berlin to his non-Jewish partner, Karl Nierendorf, and fled to New York, to which Nierendorf also fled in 1936. *Id.* at 83-85. Fritz Goldschmidt and Victor Wallerstein founded their Goldschmidt-Wallerstein Gallery in Berlin on December 1, 1919, primarily specializing in older Dutch, German, and Italian art. They were driven out of business in the summer of 1934, and the firm name disappeared two years later. *Id.* Franz Zatzstein, the business manager of the Galerie Matthiesen in Berlin, fled Germany in 1933, going first to Zurich, then to London. *Id.* at 76.

Well-known attacks on Jews in the art business during 1935, as the Welfenschatz sale concluded, included:

- February 1935: Seizure by the Gestapo of 64 works out of 200 that were to be auctioned by Max Perl in Berlin, including 18 owned by the recently deceased Jewish collector Ismar Littmann.
- January and April 1935: As a result of the exclusions noted above, Paul Graupe, Berlin auctioned off the collections of the Galerie van Diemen & Co., the Altkunst Antiquitäten GmbH, the Dr. Benedict & Co., and the Dr. Otto Burchard & Co.—all Jewish-owned firms. Fischer-Defoy & Nürnberg, *Gute Geschäfte* at 51.
- August 1935: The exclusion of Galerie Stern of Duesseldorf from further trading expanded upon an earlier ban, in late 1933, on auctions at its gallery.

*See Berz & Dorrman, Raub und Restitution* at 71, 76-77, 99.

Further reducing the sellers' negotiating leverage regarding the Welfenschatz was their knowledge that they were effectively dealing directly with the Nazi State—*i.e.*, the same state that was destroying the social and economic livelihood of German Jewry. The Dresdner Bank led the acquisition of the Welfenschatz. The State had bailed-out the bank in 1931, and between 1932 and 1937, Dresdner was effectively a government-owned enterprise. After January 1933, Nazi authorities immediately began applying the civil service exclusion law to the bank. More than half of the bank's 540 Jewish employees were fired or forced into early retirement in 1933—and more than one-third of the remaining, supposedly exempt, Jewish employees were forced out over the next eighteen months.



In all, by about the time of the Welfenschatz sale, 400 of 540, or 74%, of the bank's Jewish workforce had been removed. See Dieter Ziegler, *Die Dresdner Bank und die deutschen Juden* 48, 53 (2006). At the beginning of 1935, 90% of Dresdner's stock remained in the hands of the Reich or a bank controlled by the Reich. Johannes Bähr, *Die Dresdner Bank in der Wirtschaft des Dritten Reichs* 66-74 (2006).

Thus, during the period from January 1933 to June 1935, the Nazi regime was taking concerted steps to destroy the social and economic rights and freedoms of German Jews and to make their continued presence in Germany increasingly unbearable. This is true if viewed generally, in terms of any Jewish person's ability to exercise social and economic rights, *and* it also is true if viewed specifically, in terms of a Jewish art dealer's ability to operate freely in an open and fair market free of coercive pressures. This period is inextricably related to the genocide we call the Holocaust. To depict prevailing conditions at the time of the Welfenschatz sale as allowing Jewish sellers to stand on equal negotiating footing with non-Jewish buyers is an affront to the historical record.

## **II. HISTORICAL EVIDENCE CONNECTS ARTICLE 2(C) OF THE U.N. GENOCIDE CONVENTION TO GERMANY'S PROGRAM OF ECONOMIC DESTRUCTION OF GERMAN JEWS**

Article 2 of the Genocide Convention defines genocide to include a collection of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Article 2(c) then defines genocide to include "[d]eliberately inflicting on the group conditions

of life calculated to bring about its physical destruction in whole or in part.” Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045. *Amici* are not opining on the international law of genocide or the scope of Article 2 of the Genocide Convention. *Amici* do, however, acknowledge that various drafters of the Genocide Convention, taking account of the findings at Nuremberg, viewed Germany’s program of economic destruction as to German Jews as falling *within* the definition of genocide expressed in Article 2(c) of the Genocide Convention.

The Nuremberg Tribunal did not apply the crime of genocide to the Major War Criminals. Rather, the Major War Criminals were convicted of war crimes that included crimes against humanity committed *after* September 1, 1939, when Germany invaded Poland. *See* Indictments, *United States v. Brandt, et al.* (Int’l Military Trib. at Nuremberg 1946) (indicting defendants only for acts that occurred after September 1939). The Tribunal did, however, find that the Nazi program to destroy the Jews began in January 1933 (and covered the period at issue here), but limited its use of that finding to providing a predicate for its war crimes ruling. *See Goering*, 6 F.R.D. at 161-62. The drafting history of the Genocide Convention suggests that in defining genocide, various U.N. delegates took note of the Nuremberg findings and understood that destroying a targeted group’s social and economic existence would fall within the definition of genocide under the Convention.

During World War II, Raphael Lemkin, who coined the term “genocide,” wrote that the crime could include the “disintegration of . . . the economic existence of national groups.” Raphael Lemkin, *Axis Rule in Occupied Europe*

79 (1943). Lemkin also provided economic examples of genocide that included the Nazis' "immediately depriv[ing]" Jews of economic existence through "expropriation and by forbidding them the right to work." Raphael Lemkin, *Genocide – A Modern Crime* 39-43 (1945). Following the war and the Nuremberg rulings, a resolution seeking a convention to criminalize genocide was offered by U.N. delegates who cited the Nuremberg Tribunal's failure to expressly punish acts committed prior to the war, which some delegates called a "peacetime genocide." William Schabas, *From the Holocaust to the Genocide Convention* 2, 15-16 (2008).

Lemkin was one of three principal authors of the draft Genocide Convention prepared by the U.N. Secretariat. That draft collected detailed examples of what could qualify as genocide, including "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." Draft Convention on the Crime of Genocide, Art I(II), E/447 (1947). This draft went to the Sixth Committee of the General Assembly, which proceeded to negotiate what would become the final text of the Genocide Convention. *See generally* Rep. of the Sixth Committee, Genocide: Draft Convention and Report of the Economic and Social Council, A/760 (1948).

Ultimately, Article 2(c) was added as part of an effort to clarify that any list of what constitutes genocide was not intended to be exhaustive. U.N. ESCOR, 8th Sess., 69th mtg. at 57 (Oct. 7, 1948) (Venezuelan delegate noting that "in his opinion the definition was not an exhaustive one"); *see also* U.N. ESCOR, 8th Sess., 72nd mtg. at 83 (Oct. 12, 1948)(Polish delegation stating that it was "impossible to

enumerate every act which might constitute the crime of genocide,” and that any enumeration “should be regarded as a statement of typical cases cited as examples”); *id.* at 82 (Yugoslav delegate stating that “genocide was always preceded by a number of preliminary acts. It was essential to combat genocide in all its forms, not merely at the last stage, which was the stage at which ‘an attack on . . . life’ occurred”).

The Soviet Union, which drafted the amendment that added subclause 2(c) to the definition, said that the specific acts enumerated in Article 2 were based on historical considerations relating to the acts most frequently committed by the Nazis. With respect to what became Article 2(c), the Soviets explained that the language was drafted to include all acts capable of creating conditions of life aimed at the total or partial extermination of a group. U.N. ESCOR, 8th Sess., 81st mtg. at 173 (Oct. 22, 1948); *see also id.* at 180 (Soviet delegate stressing “the point that the intent to impose certain living conditions was an essential factor of the crime” and that “[t]he text suggested did not contain any enumeration as it was impossible to provide for all measures which might be taken in order to create the living conditions contemplated”). The Soviet amendment was adopted, adding Article 2(c) to the Genocide Convention. U.N. ESCOR, 8th Sess., 82nd mtg. at 183 (Oct. 23, 1948). As originally worded, Article 2(c) read: “The deliberate infliction of conditions of life for such groups as are calculated to bring about their physical destruction in whole or in part.”<sup>3</sup>

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3. *Amici* also acknowledge that the Genocide Convention makes the crime very hard to prove, including because Article 2 requires a showing of specific intent to create the conditions

**CONCLUSION**

The history of the Holocaust establishes that, during 1933-35, the Nazi regime promoted the exclusion, immiseration, and emigration of German Jews, including by creating market conditions that coerced Jews to sell property at less than its fair value. This early period was consistent with and part of what became the larger Holocaust directed at Jews across Europe and was so considered by the drafters of Article 2(c) of the Genocide Convention in defining the crime of genocide.

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falling within Article 2(c). As established at Nuremberg, the Nazi program that began on January 30, 1933, was aimed at creating conditions that, sooner or later, would destroy the German Jewish community.