No. 19-351

In The
Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL.,

Petitioners,

v.

ALAN PHILIPP, GERALD STIEBEL, AND JED LEIBER,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1) Whether claims of Nazi property takings from German Jews are claims of "property taken in violation of international law," and therefore subject to jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (the "FSIA").

2) Whether a court may decline the jurisdiction granted to it by Congress under the FSIA on the basis of a new comity-based abstention doctrine, notwithstanding the law's explicit confirmation of jurisdiction over Nazi property theft and comprehensive framework for sovereignty-related defenses to suit.

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STATUTORY PROVISIONS INVOLVED

Those relevant statutory provisions not already set forth in the Addendum to Petitioners' Brief are set forth in a corresponding Addendum to this Brief.

STATEMENT OF THE CASE

The Nazis' organized theft of art starting in 1933 is an unparalleled property crime that Congress has called the "greatest displacement of art in human history." In 1935, the Nazis—led by Hermann Goering and for Hitler's personal benefit—forced the sale of the collection at issue in this case (known as the Welfenschatz, or in English, the Guelph Treasure) by the Jewish art dealers (the "Consortium"), whose heirs and successors are Respondents Alan Philipp, Gerald Stiebel, and Jed Leiber (the "Heirs"). The transaction at the heart of this case began in a letter to Hitler from the mayor of the city where the Consortium members lived; it was pushed along by participants in the conference where the Final Solution was decided; and it was directed by Hermann Goering. If such a coerced sale is not a taking in violation of international law, then nothing is.

Petitioners Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz (in German, "SPK"; in English, Prussian Cultural Heritage Foundation, or "Prussian Foundation") ask the Court to (1) insert text that Congress did not write into the takings clause of the FSIA found at 28 U.S.C.

§ 1605(a)(3), and (2) ignore the FSIA's well-defined contours of international comity and replace them with a free-form abstention doctrine. The Court should reject both invitations.

Congress conferred jurisdiction over foreign sovereigns for the claims in this case for Nazi-era property takings when it passed § 1605(a)(3) in 1976. That provision provides jurisdiction over claims regarding "property taken in violation of international law." Congress reaffirmed that jurisdiction as recently as 2016 when it amended the FSIA to make specific reference to jurisdiction over claims to works of art taken during the Nazi era. 28 U.S.C. § 1605(h)(2)(A). There are cases where the Court may need additional analytical tools to understand the meaning of a law, but this is not such a case because Congress has expressed itself decisively.

Even if the Court held that the statutory language required further context, the consistent and repeated action over nearly eighty years by the United States to address property crimes of the Holocaust leaves no doubt that a forced sale like that endured by the Consortium was a taking of property in violation of international law. Petitioners suggest that the Nazis' plunder of property from German Jews did not violate international law and was merely a domestic issue between the German state and German citizens. Their interpretation rewrites, indeed it mocks, the history of the Holocaust.

Once these claims are within the reach of the FSIA, there is no other reason to dismiss the case. The United States provides comity to foreign states by deeming them immune from suit—unless the claims meet one of the small number of exceptions set forth in the FSIA. The FSIA's comprehensive framework *is* comity. *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014). Petitioners have received the comity to which they are entitled.

The FSIA strikes the balance between comity and the countervailing rights of American litigants to avail themselves of U.S. courts for acts that the FSIA deems sufficiently distinct from legitimate sovereign behavior. The FSIA compels a plaintiff to meet exacting criteria even to begin its case. It provided the comity afforded to Petitioner Germany that led to its dismissal from the case under the commercial nexus requirement of § 1605(a)(3) (leaving only the Prussian Foundation). Comity has boundaries, however.

Congress's specific provision of jurisdiction for Nazi-looted art theft eliminates any argument for discretionary abstention. It would render the repeated Congressional pronouncements on the subject of Nazi-looted art meaningless. Particularly where the abstention urged by Petitioners is merely a recasting of the unsuccessful *forum non conveniens* defense that Petitioners lost and did not appeal, the Court should not permit them a second bite at the apple. Petitioners would invite the very chaos whose "bedlam" Congress abated with the FSIA.

Factual Background

In 1929, the Consortium bought the Welfenschatz, a collection of medieval religious and devotional art. JA 63. On January 30, 1933, Adolf Hitler was appointed Chancellor of Germany. JA 68. State-organized boycotts and other harassment of Jewish businesses spread in March and April of 1933, just weeks after Hitler's ascension. JA 70. By the spring of 1933, the concentration camp at Dachau had opened. *Id.*

In 1933, Minister for Propaganda and Education Joseph Goebbels founded the Reich Chamber of Culture to assume total control over cultural trade. JA 87. Only members of the chamber were permitted to conduct business, effectively ending the means of work for any Jewish art dealers like the Consortium members. *Id.*

The Consortium's members lived in Frankfurt, where Friedrich Krebs ("Krebs") was mayor. Krebs had distinguished himself as mayor by firing all Jewish civil service employees in 1933, even before Nazi laws required it. That fall, Krebs wrote to the *Führer* himself to ask for Hitler's help, specifically, to acquire the Welfenschatz for only a third of its value. JA 152.

Hermann Goering and his henchmen soon assumed the leading role in the quest for the Welfenschatz. Goering cultivated for himself an image of culture and refinement that was belied by his lust for plundered art. JA 75. Arguably the most notorious art looter in European history, Goering routinely went through the bizarre pretense of "negotiations" with,

and "purchases" from, counterparties who had no ability to refuse to sell to him at the risk of their lives. *Id.*

In the summer of 1934, the plot gained two key participants: Paul Körner ("Körner") and Wilhelm Stuckart ("Stuckart"). JA 82. These two men had such notorious accomplishments between them as membership in the Nazi party as far back as 1922 and later in the SS, drafting the Nuremberg Race Laws in 1935, and most chillingly, participating in the Wannsee Conference of January 1942, at which the Nazi government explicitly resolved to murder every Jew in Europe. JA 83–84. Together, Stuckart and Körner discussed enlisting Hitler's further, personal aid with their plan to orchestrate the desired "sale." (JA 84–85; 159).

After two years of direct persecution and with no ability to sell their property on the market, the Consortium had only one option left: the Nazis knocking on their door. JA 94–95. The coerced sale was completed on June 14, 1935 in exchange for a sum that an expert appraisal has since confirmed was exactly what Krebs proposed in 1933: barely a third of the value. JA 43; 47. The Consortium did not receive even that amount. Some was "paid" in swaps of subpar art. The Consortium was obligated to pay a "commission" of 100,000 RM to the cabal that orchestrated the theft. JA 97. After that, nearly a quarter of the transaction price was paid to a blocked account that the Consortium could not access. *Id.*

Goering then presented the ill-gotten collection to Hitler as a gift. JA 102. The transaction destroyed the Consortium's members:

> When the Nazi whirlwind had finally passed by, only Saemy Rosenberg really survived, to become one of the great art dealers of New York. Julius Goldschmidt escaped to London, a broken man. Z. M. Hackenbroch was dragged to his death through the streets of Frankfurt by a Nazi mob.

William M. Milliken, *Born Under the Sign of Libra* (1977), at 115 (cited at JA 99).

The collection has been held by the Prussian Foundation since that agency was created to take possession of the cultural property once held by Prussia when that political entity was disbanded by the Allies for starting two world wars. JA 49. The Prussian Foundation administers the state museums in Berlin.

Procedural Background

Several years ago, the Heirs and the Prussian Foundation went to Germany's "Advisory Commission," a non-binding mediation body that issues recommendations to German state museums, recommendations that those museums can accept or reject. JA 113–18. The Advisory Commission recommended against restitution and the matter remained unresolved.

The Heirs brought suit in 2015. JA 1. Petitioners moved to dismiss, arguing, *inter alia*, that: (1) the FSIA's takings clause did not cover the Heirs' claims; (2) the claims did not satisfy § 1605(a)(3)'s commercial nexus requirement over Germany; (3) prudential exhaustion (framed as international comity) compelled dismissal because the Heirs had not first sued in Germany; (4) the Advisory Commission recommendation was actually a ruling on the merits such that adjudicatory comity compelled dismissal; (5) the policy of the United States forbids individual claims like these; and (6) the doctrine of *forum non conveniens* compelled dismissal.

The District Court rejected each of these arguments in a Memorandum Opinion on March 31, 2017. Pet. App. 37–93. Petitioners did not appeal the *forum non conveniens* ruling. The court of appeals affirmed on July 10, 2018, except as to Germany, which the court dismissed. The court of appeals held that because Germany has never used the property at issue (the Welfenschatz) commercially in the United States, the commercial nexus test of § 1605(a)(3) was not met as to Germany. Pet. App. 25–26. Petitioners asked for rehearing *en banc*, which the court of appeals denied. Judge Katsas dissented from that denial. The Heirs conditionally cross-petitioned the Court to review the dismissal of Germany, which the Court denied on July 2, 2020. *Philipp et al. v. FRG, et al.*, 19-520.

SUMMARY OF THE ARGUMENT

I. It is established historical fact that Hitler's ascent to power on January 30, 1933 began the Nazi campaign to destroy Germany's Jewish community, including by robbing them of their property and economic rights. 28 U.S.C. § 1605(a)(3) provides jurisdiction over claims of "property taken in violation of international law."[1] The Nazis' comprehensive theft of German Jews' property had one indisputable goal: to destroy Germany's Jewish community. That eliminationist intent is part of the Holocaust, a genocide, and genocide always violates international law. Accordingly, § 1605(a)(3) provides jurisdiction in the United States over claims arising out of this forced sale by Jews to Nazi agents of Hermann Goering.

The FSIA takes its meaning from its text, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1736 (2020), and the relevant provision places no limit on jurisdiction based on the citizenship of the victim. Moreover, Congress affirmed explicitly in 2016 that the FSIA's takings clause applies to art taken during the entire Nazi criminal era, beginning on January 30, 1933. 28 U.S.C. § 1605(h).

To the extent the Court inquires what the phrase "property taken in violation of international law" was understood to mean at the time of the FSIA's enactment in 1976, the phrase is not a term of art. It is ordinary language and means what it says. This phrase

[1] As discussed below, § 1605(a)(3) also requires a commercial nexus with the United States.

includes, where appropriate, arbitrary and discriminatory takings regardless of a victim's citizenship.

Further, Congress has since affirmed repeatedly in other laws that unique among perpetrators, the Nazis' property crimes violated international law; that unique among claimants, the victims of Nazi property and art looting (and their heirs) are entitled to jurisdiction in U.S. courts over their claims; and that the criminality of those takings began the day Hitler took power. *See*, *e.g.*, Holocaust Expropriated Art Recovery Act, H.R. 6130, Pub. L. No. 114-308; Holocaust Victims Redress Act, Pub. L. No. 105-158.

Petitioners argue that Congress could not have meant in the FSIA to interfere with genocidal takings, as long as the genocide was within a country's "own borders." Petitioners' Brief, i. Petitioners' complaints about the effect of the jurisdiction conferred by Congress are for the legislature to entertain, not the courts.

Rather than address Congress, Petitioners ask the Court to add new language into the statute. Finally, in an effort to take the Heirs' claims beyond the reach of the law, Petitioners attempt to amend the history of when the Holocaust began, a position rejected at Nuremberg and in the works of preeminent academic Holocaust historians.

II. On the second question presented, the FSIA has already provided the comity to which Petitioners are entitled. Comity is "a principle or practice among political entities . . . whereby legislative, executive, and

judicial acts are mutually recognized." *Comity*, *Black's Law Dictionary* (11th ed. 2019). This broad concept has already been distilled into specific, workable doctrines. When a sovereign is sued in a foreign court, comity is expressed through sovereign immunity. The FSIA fully embodies this comity-based doctrine; a foreign sovereign is absolutely immune from suit unless one of the small number of exceptions in the statute applies.

Below, Petitioners argued unsuccessfully in favor of a comity-based exhaustion requirement. They have abandoned that argument, and now instead seek to revive the interests-based[2] argument that they made in service of their *forum non conveniens* argument to the District Court. That argument failed, and Petitioners did not appeal it. They may not attempt a backdoor appeal now.

Petitioners do not articulate any particular comity doctrine; they only argue that *this* case should be dismissed. Germany has already received comity because the FSIA's framework was applied; Germany is out of the case as a result of the application of the commercial nexus requirement. By contrast, the Prussian Foundation is within the law's framework, and the case should go forward.

[2] The court of appeals dismissed Germany, and the Court declined the Heirs' conditional cross-petition to review that dismissal. Germany is not a party to this case, and any assertion of Germany's interests should be viewed through that lens.

ARGUMENT

I. The Plain Text of 28 U.S.C. § 1605(a)(3) Deprives the Prussian Foundation of Sovereign Immunity.

A. The Takings Clause Provides Jurisdiction over Claims for Nazi Takings During the Holocaust.

To establish jurisdiction based on the takings clause in § 1605(a)(3), which addresses "rights in property taken in violation of international law," "the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017). The most important criterion to determine what the takings clause means is the simplest: what it says. As the Court explained last term:

> [O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.

Bostock, 140 S. Ct. at 1738. Where a term is "neither defined in the statute nor a term of art, we are left to construe it 'in accordance with its ordinary or natural meaning.'" *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547

U.S. 370, 376 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 467 (1994)). The phrase "taken in violation of international law" is "neither defined in the statute[3] nor a term of art," so its ordinary and natural meaning governs.

The international community confirmed in 1948 that "genocide, whether committed in time of peace or in time of war, is a crime under international law[.]" Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), art. 1, Dec. 9, 1948, 78 U.N.T.S. 277; *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012) ("All U.S. courts to consider the issue recognize genocide as a violation of customary international law."). Because genocide violates international law, takings in connection with genocide are claims of "property taken in violation of international law."

It is little surprise that quite literally every case to consider the question since the FSIA's enactment has held that the organized plunder of art—including forced "sales"—by Nazis, their puppets, and their allies meets the threshold takings requirement. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (painting sold for paltry sum to finance flight of German Jew constituted taking in violation of international law); *Altmann v. Republic of Aus.*, 317 F.3d 954,

[3] Although there is no definition *per se*, 28 U.S.C. § 1605(h) does illuminate the meaning of "property taken in violation of international law," as discussed below.

968 (9th Cir. 2002) (Nazis' "taking appears discriminatory. Altmann is a Jewish refugee"), *aff'd in part*, 541 U.S. 677 (2004); *de Csepel v. Republic of Hung.*, 808 F. Supp. 2d 113, 129–30 (D.D.C. 2011); *de Csepel v. Republic of Hung.*, Civil Action No. 10-1261 (ESH), 2016 U.S. Dist. LEXIS 32111, at *50 (D.D.C. Mar. 14, 2016); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 307 (D.D.C. 2005) (paintings left for safekeeping by Kazimir Malevich with custodian later persecuted by Nazis warranted later jurisdiction against current sovereign possessor of artworks).

One of Germany's federal states even acknowledged as much in defending against claims to paintings once owned by Nazi-persecuted art dealer Alfred Flechtheim. The Free State of Bavaria wrote: "genocidal takings committed by a state against its nationals" constitute takings in violation of international law under § 1605(a)(3), and "*the usual 'domestic takings rule*' whereby 'a foreign sovereign's expropriation of its own national's property does not violate international law' *does not apply where the foreign state is engaged in genocide. . . .*" *Hulton v. Bayerische Staatsgemäldesammlungen*, No. 16-cv-9360 (RJS) (S.D.N.Y.), Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction Under the FSIA at 22, November 15, 2017 (Docket No. 26) (emphasis added).

i. An amendment to the FSIA confirms that the takings clause provides jurisdiction in this case.

Congress has specifically identified Nazi Germany's takings of art, from January 30, 1933 through May 8, 1945, as subject to jurisdiction under 28 U.S.C. § 1605(a)(3). Congress has stated explicitly that this historic series of takings violated international law (genocidal or otherwise) and are takings within the scope of the statute. Where Congress has directly addressed the question presented, no further inquiry is needed. There is no ambiguity to resolve.

In 2016, Congress amended the FSIA to provide that a loan of art (or another "object of cultural significance") into the United States, without more, would *generally* not satisfy the commercial nexus test of § 1605(a)(3). 28 U.S.C. § 1605(h) (2016) (named the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, the "Clarification Act"). Yet in limiting jurisdiction—that is, in writing out a whole category of plaintiffs and cases—Congress specifically clarified that this limitation would not apply to cases involving the Nazis' takings of art and other cultural property. 28 U.S.C. § 1605(h)(2)(A). Congress codified precise definitions: a "covered government" includes "the Government of Germany during the covered period," which is defined to be "the period beginning on January 30, 1933, and ending on May 8, 1945." 28 U.S.C. § 1605(h)(3)(B)(i), (C).

As Petitioners acknowledge, § 1605(a)(3) must be interpreted as "compatible with the rest of the law." Petitioners' Brief at 28, citing *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015). The Clarification Act, as the name suggests, clarifies jurisdiction. It eliminates some claims (by narrowing the commercial nexus), but reaffirms the takings clause's existing grant of jurisdiction over Nazi property theft. Congress could not have preserved jurisdiction that did not already exist.

Petitioners have argued that German Jews cannot obtain jurisdiction under § 1605(a)(3), but this contention conflicts with Congress's definition of the "covered period" in § 1605(h) as beginning on January 30, 1933.[4] At least until Germany annexed Austria and the Czech Sudetenland in 1938, all the victims of the Nazis' racially-motivated art looting *were* German Jews, who were the only Jews the Nazis had the power to oppress.[5] Neither the takings clause nor the Clarification

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[4] The Clarification Act preserved jurisdiction over other post-1900 takings of art from vulnerable groups with no limitation placed on the nationality of the victim or of the perpetrator:

> [T]he action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group.

28 U.S.C. § 1605(h)(2)(B)(ii).

[5] As discussed below, Jews may be deemed aliens of their respective countries during the Holocaust because they were not treated as citizens. It is a dark irony that as Hitler tried to rebuild Germany's military power in the 1930s, he was overly solicitous of protecting the rights of citizens of other nations (Jews

Act (codified as part of the FSIA) place any limitation on claims where the nationality of the victim is the same as the perpetrator.

Petitioners have no answer to the Clarification Act; they just ignore it. The Brief of U.S. as Amicus Curiae suggests that the Clarification Act preserved jurisdiction that already excluded domestic takings. That merely assumes the conclusion, however, and does not confront what Congress actually said. Like Petitioners, the Brief of U.S. as Amicus Curiae proposes to insert text into the statute that Congress did not.

Congress knew how to create such limitations and did so elsewhere. For example, the FSIA's terrorism exception applies only to claimants and victims who, at the time of the relevant act, were United States nationals, members of the armed services, or had certain connections to the United States government. 28 U.S.C. § 1605A(a)(2)(A)(ii).

B. Other Interpretative Authorities Confirm that the Takings Clause Applies.

i. The drafting history of the FSIA shows that claims based upon Nazi takings were understood to state claims under the FSIA takings clause.

Petitioners argue that the original understanding of § 1605(a)(3) was that it "only addresses a state's

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included) living in Germany, lest he draw the ire of other governments when he was not yet ready to take them on.

taking of foreign nationals' property," and that "only foreign takings implicate the concerns of the international legal system"—even though the law says neither. Petitioners' Brief, 17. These assertions are not only beyond the statutory text, but factually incorrect. To the extent that the Court considers external sources, they confirm jurisdiction:

> [W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. . . . [T]his Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence.

Bostock, 140 S. Ct. at 1750.

When Congress considered and ultimately passed the FSIA, Holocaust-era takings of art and Holocaust-era domestic takings more generally were well understood to be within the ordinary meaning of "property taken in violation of international law." At a hearing before the Subcommittee on Claims and Governmental Relation of the Committee of the Judiciary,

Representative George E. Danielson[6] noted in discussing the reach of the takings clause:

> What about a work of art? It may exist for hundreds of years. *Hitler confiscated and nationalized unknown quantities of valuable artwork and some of them have shown up elsewhere*. I mean, this is not just imagination, you know, it is real.

A Bill to Define the Circumstances in which Foreign States are Immune from the Jurisdiction of the United States Courts and in which Execution may not be Levied on Their Assets, and for other Purposes: Hearing on H.R. 3493 Before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary House of Representatives, 93rd Cong. 21 (1973) (emphasis added).

The idea that Congress would not have considered the Nazi theft[7] of art to be within § 1605(a)(3) is belied by the record. Congress also specifically anticipated domestic takings claims would be brought under § 1605(a)(3). Representative Danielson discussed a hypothetical of "a person who was a national of Lithuania, and who had property in Lithuania [that] was expropriated and nationalized by the powers which

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[6] Rep. Danielson was on the House Committee on the Judiciary in 1973 when the FSIA was first proposed and also in 1976 when the Congress enacted the FSIA (with the takings clause unchanged).

[7] As noted above, effectively all Nazi takings of art until 1938 at the earliest were "domestic" German takings.

took over Lithuania in 1939 or 1940 or 1941[.]" *Id.* at 20.[8]

The FSIA hearing testimony in 1976 summarized the takings concept succinctly: "the international law standards applied in these cases are those requiring prompt, adequate and effective compensation and that takings that are arbitrary or discriminatory in nature are not entitled to any effect in the United States." *To Define the Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Sub-comm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 94th Cong. (1976) (the "1976 Hearing") at 82. Conspicuously absent from this explanation are the words that Petitioners ask this Court to legislate into the text: "taking of property [*of aliens*]."

ii. By the time the FSIA was enacted, Nazi takings had been recognized as takings in violation of international law for decades.

The international, decades-long understanding that takings during the Holocaust violated international law and were subject to international intervention demonstrates that the FSIA included such takings within its reach at the time Congress passed it.

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[8] When Nazi Germany invaded the USSR, a Lithuanian government sympathetic to Germany oversaw the actual persecution and murder of Lithuanian Jews for a substantial part of the war.

When the war ended, the victorious Allies enacted a series of Military Government Laws to govern defeated Germany. Military Government Law No. 59 ("MGL No. 59"), entitled "Restitution of Identifiable Property," defines property as "confiscated" where it was (1) acquired not in good faith, under duress, or otherwise an unlawful taking; (2) seized by government act or in abuse of a government act; or (3) seized as a result of measures taken by the Nazis. Article 3 reads (emphasis added):

> Presumption of Confiscation
>
> It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning of Article 2:
>
> *Any transfer* or relinquishment of property made during a period of persecution *by any person who was directly exposed to persecutory measures* on any of the grounds set forth in Article 1;
>
> Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 *was to be eliminated in its entirety from the cultural and economic life of Germany* by measures taken by the State or the [Nazi Party].

The presumption of confiscation[9] was not limited to the Nazis' non-German victims; to the contrary, the third paragraph refers exclusively to German victims.

To apply this presumption, the U.S. staffed the Monuments, Fine Art and Archives Division, better known as the Monuments Men, to return the millions of recovered objects to places from which the Nazis had stolen them—including to Germany itself. The Monuments Men did not exempt from their work those objects taken (or "purchased") from German Jews.[10]

In 1948, the United Nations adopted the Genocide Convention, which states the criminality of "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. . . ." Genocide Convention, art. 2(c). Hitler was never subtle about his desire to eliminate Jews, and economic persecution was the first tool the Nazis used in service of this goal. This "[d]eliberate inflict[ion]" of persecution intended to eliminate Jews began immediately in 1933, when Jews were expelled

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[9] This law was consistent with actions the Allies took even before the war ended and its outcome was still in doubt. In January 1943, the Allies issued the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (the "London Declaration"), which declared Nazi takings illegitimate "whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected."

[10] *See* Robert Edsel, *The Monuments Men: Allied Heroes, Nazi Thieves and the Greatest Treasure Hunt in History* (Center Street 2010).

from Germany's social and economic life, and when the first Jews were sent to concentration camps. With the leadership of the very war criminals implicated in the plot to acquire the Welfenschatz, Germany imposed conditions that were designed from the start to "eliminat[e] [the Consortium] in its entirety from the cultural and economic life of Germany" (MGL No. 59) and to effect the Consortium's "physical destruction in whole or in part." Genocide Convention, art. 2(c).

On April 27, 1949, the State Department issued Press Release No. 296, entitled: "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers." It stated, *inter alia*, "it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property," and that "the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." 20 Dep't St. Bull. 573 (1949); *see also Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (citing Press Release No. 296, "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question."). The author of Press Release No. 296 was Acting Legal Advisor Jack B. Tate, the very man who authored the "Tate Letter" of 1952 that

commenced the restrictive theory of immunity, under which the State Department made (or did not make) individualized "suggestions of immunity" until the FSIA codified the instances when a sovereign's immunity is abrogated.

iii. Congress has repeatedly confirmed its condemnation of Nazi property takings.

The only remaining appropriate tool of interpretation is what Congress has said in other laws on the same topic. *United States v. Fausto*, 484 U.S. 439, 453 (1988) ("The courts . . . interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted."). The proper authorities are Congressional statements about this specific topic (Germany's property theft and art looting), which are unanimous and bipartisan.

Congress could not have been more emphatic or unwavering that the art takings of the Holocaust violated international law, and that claims regarding those takings are properly brought in U.S. courts. From the Holocaust Victims Redress Act of 1998 ("HVRA"), to the Holocaust Expropriated Art Recovery Act ("HEAR Act") and Clarification Act in 2016, to the Justice for Uncompensated Survivors Today Act ("JUST Act") in 2017, it is hard to imagine how Congress could state more clearly that Nazi art theft—beginning on January 30, 1933—offended international law and

warrants U.S. intervention. Petitioners do not mention these laws so much as once.

The HEAR Act does two things: first, it creates a uniform, and extended, statute of limitations for Holocaust victims and their heirs to bring suit in U.S. courts. Second, when Congress and the President spoke as one in the HEAR Act, they expressed the clearest formulation of U.S. policy about Nazi art takings. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). The HEAR Act makes specific findings about Nazi property crimes related to art:

> It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history."

Pub. L. No. 114-308, 130 Stat. 1524 (2016). The HEAR Act defines its "covered period" as "the period beginning on January 1, 1933, and ending on December 31, 1945"—that is, even broader than the duration of Hitler's regime. *Id*. at § 4(3). The HEAR Act also incorporates the findings expressed in the HVRA:

> *The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide* against individuals of Jewish and other religious and cultural heritage and, in

> this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

Pub. L. No. 105-158, 112 Stat. 15 (1998) (emphasis added).

When the HEAR Act was passed, it was not a matter of speculation whether sovereign states might be defendants in Holocaust art restitution cases pursuant to § 1605(a)(3); it was already happening. *Altmann* had been decided a dozen years before, after which several cases had been filed, decided, or were pending in 2016. Those cases included the *Malewicz* case, the *Cassirer* case, the *de Csepel* case, and this one. Congress let that interpretation of the takings clause stand.

Most recently, in 2017 Congress passed the JUST Act, Pub. L. No. 115-171, 132 Stat. 1288, which directs the Secretary of State to compile a report on the progress of various countries in addressing Holocaust restitution. The JUST Act defines "wrongful transfers" to include "forced sales or transfers, and sales or transfers under duress during the Holocaust era[.]" Any objection that this suit addresses Germany's "acts within its own borders" (Petitioners' Brief) is a complaint about decades of U.S. action aimed at facilitating redress for precisely these types of claims.

By contrast, the tortured analogies like the Alien Tort Statute ("ATS") comparison offered by Petitioners are inapt. The United States agrees that ATS and

FSIA jurisprudence should not be conflated. *See* Brief of U.S. as Amicus Curiae at 18–19 ("[T]here is no reason to assume that Congress intended for the expropriation exception to be interpreted in accordance with the ATS, a statute that employs different statutory language, was drafted in a different context, was enacted almost two centuries earlier, and was not considered in the context of human-rights law until after the FSIA was enacted.").

iv. The domestic takings rule does not apply to genocidal acts.

Congress did not refer to "domestic takings" in the FSIA. Hence, any concerns that the domestic takings rule reflects "a broader reluctance of nations to involve themselves in the domestic politics of other sovereigns" were not embodied in the FSIA.[11] Decades of U.S. policy confirm that any deference for domestic affairs does not extend to the Nazis' thefts and forced sales. There is no such deference when a state commits the international crime of genocide. Offering that deference here would conflict with the Clarification Act, the HEAR Act, the HVRA, and the JUST Act. In *Helmerich*, the Court affirmed that while domestic takings are usually immune from suit, "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation

[11] *Simon v. Republic of Hung.*, 812 F.3d 127, 144 (D.C. Cir. 2016).

that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." 137 S. Ct. at 1321.

If there is any systemic domestic expropriation that violates international law, and that already led to the United States "to involve [itself] in the domestic politics of [another] sovereign[]," it is the Holocaust. *See also Abelesz*, 692 F.3d at 676 ("The international norm against genocide is specific, universal, and obligatory. Where international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends[.]"); *Mezerhane v. República Bolivariana De Venez.*, 785 F.3d 545, 551 (11th Cir. 2015). The Nazis' unique criminal treatment of German Jews puts these claims outside the application of the domestic takings rule. *See Cassirer*, 616 F.3d at 1023 n.2 (taking by Germany was within the expropriation exception where Jewish victim "Lilly [Cassirer] was no longer regarded by Germany as a German citizen[.]").

Petitioners suggest that the Heirs "never disputed below that their Complaint alleges that Germany expropriated property from German nationals. They have forfeited any novel argument to the contrary." Petitioners' Brief at 19, n.7. This is untrue as a matter of fact and irrelevant as a matter of law. As discussed below, it is Petitioners who have changed their theory of the case as it relates to comity and who have "forfeited [their] novel argument to the contrary."

The Heirs alleged in the initial Complaint and have argued at every stage since that Petitioners' technical distinction about the citizenship of the Nazis' victims is nonsensical and at odds with Congress. Further, as the successful parties below, the Heirs may argue any theory in favor of affirmance. *Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979) ("Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, 'whether or not that ground was relied upon or even considered by the trial court.' ").

C. The Text of the FSIA Can Only Be Amended by Congress.

1. Petitioners use extraneous sources to graft meaning onto the takings provision of § 1605(a)(3). They assert that "taken in violation of international law" is a term of art, but it is not. Petitioners' Brief, 10, 22, 23. Petitioners have not identified a single other use of that phrase before or since the FSIA was passed. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) ("The 'pattern or practice' language in § 707(a) of Title VII . . . was not intended as a term of art, and the words reflect only their usual meaning."). "That this natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant, is an elementary rule of construction frequently recognized and followed in this court." *United States v. First Nat'l Bank*, 234 U.S. 245, 258 (1914). If Congress had intended to incorporate a

certain understanding, "by a few simple words it could have effected that purpose." *Id.* at 262.

Congress could have added just two words to limit the takings clause to "rights *of aliens* in property taken in violation of international law."[12] It did not. Petitioners' argument is an invitation to look *away* from the words of this law, and instead to insert words from the Restatement[13] into the statute.

Petitioners' argument depends on the idea of "a specialized common law meaning [that] congress hasn't itself invoked" and "the common law terms of art associated with that meaning." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019). Petitioners discuss the phrase "takings in violation of the customary international law of expropriation" (Petitioners' Brief, 22; 25; *see also id.* at 17, 26, 28), which does not appear in the statute, and then they purport to define *that* term as limited to claims by aliens. *Cf. Argus Leader Media*, 139 S. Ct. at 2365 (rejecting proposal to "imbue statutory terms with a specialized common law meaning. . . ."). Congress could easily have framed § 1605(a)(3) as "takings from aliens in

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[12] As discussed above, Congress did limit the terrorism exception to U.S. nationals and other individuals with certain other U.S. connections. *See* Petitioners' Brief, 30 ("In similar statutory schemes, this Court has often used the existence or scope of one exception to clarify ambiguity in another.").

[13] Petitioners' Brief, 23, uses the word "only" in paraphrasing the Restatement. The word does not appear in the Restatement itself.

violation of the customary international law of expropriation" as Petitioners wish it had, but did not.

Finally, to the extent that Congress considered expropriation during its discussion about the FSIA, it stated neither that the takings clause was coterminous with the law of expropriation, nor that it believed only aliens could bring expropriation claims.[14] The legislative history that Petitioners cite suggests the opposite. *See* Petitioners' Brief, 24 (quoting H.R. Rep. No. 94-1487, at 19–20 (1976) for the expectation that the takings clause "would *include* the nationalization *or* expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would *also include* takings which are arbitrary or discriminatory in nature.") (emphasis added). Not even the legislative history provides the words that Petitioners wish to insert into the statute: "of aliens."

2. Petitioners suggest that the Court's opinion in *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 417 (1964) and the subsequent Second Hickenlooper Amendment (22 U.S.C. § 2370(e)(2)) establish the phrase "property taken in violation of international law" as limited to the expropriation from aliens. Yet neither the Court nor the statute used that phrase or defined the scope of international law.

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[14] *See Helmerich*, 137 S. Ct. at 1321.

Sabbatino held only that "the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree" involving American-owned property. *Id.* at 439. The Court expressed no view as to *which* victims of property takings could claim a violation of international law.

In response, Congress passed the Second Hickenlooper Amendment to prevent the act of state doctrine from shielding certain claims arising out of "a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, *including the principles of compensation and other standards set out in this subsection*[.]" *Id.* at § 2370(e)(2) (emphasis added). The Second Hickenlooper Amendment uses the phrase "violation of the principles of international law" without defining it, but confirms that such violations include those in the preceding section, § 2370(e)(1). That section restricted U.S. aid to countries that have "nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any [U.S. majority-owned] corporation[.]"

Thus, Congress established that impermissible takings *included* those from United States citizens, but was silent on what other takings may be actionable under the FSIA. Congress certainly did not limit the extent of takings.[15] The FSIA, which uses different

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[15] Petitioners wrongly contend that the FSIA legislative history supports the idea of a parallel between the Hickenlooper Amendment and the FSIA. In fact, the FSIA legislative history references 22 U.S.C. § 2370 only to say that existing law on the

language from § 2370(e)(2), cannot be read to incorporate a lower court's interpretation of § 2370(e)(2). *See* Petitioners' Brief, 26 (citing *F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966)).

D. The Policy of the FSIA Is Not Under Review.

Petitioners' real grievance is that the takings clause of the FSIA exists at all, a complaint that is also the pillar of Judge Katsas's dissent below on which Petitioners rely. Petitioners' suggestions about various hypothetical retaliations that the United States could face are no different than the context when the FSIA was passed nearly forty-five years ago. None are relevant to the analysis and none justify interpreting the statute out of existence.

Petitioners' invitation to speculate about events that might follow the court of appeals' ruling is improper because "contentions about what the[y] think the law was meant to do, or should do, allow us to ignore the law as it is." *Bostock*, 140 S. Ct. at 1745. Petitioners state with certainty that Congress could never have meant to permit jurisdiction over genocidal takings by a government against its own people. Yet here again the Clarification Act controls. That provision also preserved jurisdiction pursuant to § 1605(a)(3) over claims concerning culturally significant works

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act of state doctrine would remain unchanged. Petitioners' intimation that the legislative history imports a particular definition of "property taken in violation of international law" is simply wrong.

taken after 1900 "in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group." 28 U.S.C. § 1605(h)(2)(B)(ii).

That phrasing will sound familiar because it tracks closely the property taking element of the Genocide Convention on which *Simon* relied; claims are grounded in the discriminatory nature of the taking, not the citizenship of the victim. If this jurisdiction created a risk that countries would retaliate (despite having never done so in the entirety of the FSIA's effective period), then Congress advisedly accepted that risk. *Bostock*, 140 S. Ct. at 1738.

Congress already weighed the foreign relations impact of this exception, which includes Nazi art theft. It determined other protections, like the statute of limitations (since addressed specifically by Congress in the HEAR Act), established a suitable balance. These other protections are substantial and will discourage or defeat most claims. *See Altmann*, 541 U.S. at 713 ("[S]tatutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts.") (Breyer, J., concurring).

Petitioners offer instead a deeply cynical view of American history that conflates the United States of America with Nazi Germany, and which also assumes a world full of imminent retribution for what Congress did four decades ago. The FSIA has always been

broader than European law, which contains no analogue to the takings clause without ever prompting the *quid pro quo* that Petitioners suggest is not just likely, but inevitable. The terrorism exception, 28 U.S.C. § 1605A, for example, is another unusual U.S. exception to immunity. There has been no retaliation for the terrorism exception.

E. Petitioners Distort and Minimize the Holocaust.

Unable to respond to nearly eighty years of recognition that the property crimes of the Holocaust violated international law, Petitioners instead try to distort the date when the Holocaust itself began. If they cannot nullify the entire takings clause by dismissing these thefts as "merely" takings within Germany's own borders, they hope that a taking by Nazis in 1935, at least, can be deemed beyond scrutiny. Petitioners' Brief, 35. This position shocks the conscience. In direct response to Petitioners' Brief, a bipartisan group of United States Representatives has written to Germany's Ambassador, saying: "The timeline of the Holocaust is settled and sacred. This has been the bipartisan position of the United States Congress for a generation."[16]

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[16] The letter stated, *inter alia*: "We are concerned that the brief your government has filed has attempted to distinguish the forced sale of the cultural artwork in question from 'expropriation' under international law" and expressed further concern that "your government seems to be arguing that forced sales of art to the Nazi regime do not constitute takings at all and that the

There was no period of innocence during the Nazi era during which Germany can absolve itself of responsibility for what it denigrates as varying degrees of economic challenges. German Jews ceased to be "German" the moment the Nazis took power, and long before the Nuremberg Laws. JA 70. From the London Declaration in 1943 through today, January 30, 1933 has been rightly seen as a bright line for the start date of Germany's historic misdeeds. And throughout that time, forced sales have been recognized as part of that genocide.

Asking whether the Welfenschatz itself was "essential property, like food, medicine, or shelter" (Petitioners' Brief, 36) is the wrong question. The right question is: how do Petitioners suppose that Jews obtained "essential property, like food, medicine, or shelter" in Nazi Germany? The answer is: their livelihood, which Petitioner Germany had already taken from them. The Welfenschatz was the property the Consortium had left, but there was only one buyer thanks to Körner, Stuckart, *et al*.[17] Refusing the Nazis was not an

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definition of genocide does not include what happened with respect to the full elimination of Jews from German economic life starting in 1933[.]" Letter from Representatives to Emily Haber, Ambassador to the United States (Oct. 16, 2020). The Heirs will file a request to lodge this letter with the Court pursuant to Rule 32.3. *See also The Role of the United States in Pursuing Compensation for Holocaust Victims and Heirs, and the Historical Bases for U.S. Leadership*, http://www.claimscon.org/wp-content/uploads/2020/09/2020.9.23-The-U.S.-Role-in-Holocaust-Compensation-.pdf, at 4.

[17] In addition to barring Jews from German economic life, they specifically dissuaded a potential second bidder for the

option. Economic persecution of the Jews has always been recognized as part of the Holocaust; Germany has no right to reargue, in 2020, whether the Holocaust was genocide.

"Sales" by Jews in Germany between 1933 and 1945 to Nazis were not legitimate. Indeed, Germany itself has recognized this fact:

> [L]osses resulting from legal transactions during the period of persecution should be considered cases of un-justified confiscation. . . . In the case of artworks lost as the result of state intervention, proof of a causal relation to Nazi persecution can be dispensed with.

Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999.[18]

Welfenschatz. Supp. App. 53. The Supplemental Appendix was filed with the Brief in Opposition to the Petition for Writ of Certiorari.

[18] Publicly available on a government-administered website in English at https://www.kulturgutverluste.de/Content/08_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?__blob=publicationFile&v=8, notes at pp. 33–34. The Prussian Foundation has shown it understands this principle perfectly well—it just will not extend it to Jews. Earlier this year, the Prussian Foundation returned a painting to the heirs of a German painter persecuted as a "degenerate" artist in 1937 (but not as a Jew). The Prussian Foundation acknowledged that the price exchanged could not be considered fair as a result. *See* "SPK restituiert Werk aus Hans Purrmanns Sammlung," https://www.preussischer-kulturbesitz.de/newsroom/press/press-releases/detail-page/article/2020/01/16/pressemeldung-spk-restituiert-werk-aus-hans-purrmanns-sammlung.html?L=1&cHash=9ead845c9c548179a2db574c57eea833.

Petitioners' tale of Jews' voluntarily liquidating assets as a mere consequence of the Great Depression, without even mentioning, much less coming to grips with, the roles of Hitler, Goering, Körner, and Stuckart in this "sale," is fiction. Far from middling bureaucrats, they were the Nazi leadership, the very worst of the worst, stealing art to benefit themselves personally. The Nazis' efforts to eliminate Jews did not happen all at once in 1935 after the passage of the Nuremberg Race Laws, or after Kristallnacht in 1938, or the Wannsee Conference in 1942. It happened step by step—starting on the day Hitler became Chancellor. Trying to find gaps in the Nazi regime that were *not* genocide is the mission of Holocaust distortion and denial.

The Brief of Holocaust and Nuremberg Historians (the "Historians' Brief") gives the lie to Petitioners' central historical contention. These preeminent historians, who specifically eschewed taking a position on the legal issues before the Court, explain what no individual litigant has to prove: the Nazis' intent to remove Jews from German society from the moment (indeed from before) Hitler took control, as well as the link between Petitioner Germany's persecution of German Jews and the Genocide Convention. The Historians' Brief states unequivocally that "[w]ell before the infamous Nuremberg Laws of September 1935, German Jews were systematically stripped of legal and economic rights normally associated with citizenship." *Id.* at 4. Further, the Historians' Brief leaves no doubt that "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." *Id.* at 5.

II. The FSIA Has Already Provided the Appropriate Comity to Petitioners.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). "[C]omity is, and ever must be, uncertain[.]" *Id.* (quoting Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*, 8 The Lawbook Exchange, Ltd. 1 (2008)). Congress addressed this uncertainty with the FSIA, which creates clear statutory rules for the comity extended to a foreign sovereign sued in a United States court. As a result of this statutorily-enshrined comity, Germany has been dismissed from the case. The Prussian Foundation has no basis to seek additional comity outside the text.

A. The FSIA Expresses the Comity that the United States Provides to Foreign Sovereigns and Instrumentalities Like the Prussian Foundation.

Sovereign immunity is a function of comity, and the FSIA fully occupies the field of sovereignty-based defenses as an expression of comity. As Monroe Leigh, Legal Advisor, Department of State, explained in the 1976 Hearing: "Sovereign immunity, of course, is a principle of international law under which domestic courts, in certain cases, refrain from exercising jurisdiction against a foreign state." 1976 Hearing at 25; *see also NML Capital*, 573 U.S. at 140 ("Foreign sovereign immunity is, and always has been, 'a matter of grace and comity on the part of the United States'") (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). Foreign sovereign immunity decisions address "whether and when to exercise judicial power over foreign states." *Id.* The FSIA's comprehensive rules of immunity define those considerations of comity. *NML Capital*, 134 S. Ct. at 2255.

Before the FSIA was enacted, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488. "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's 'comprehensive set of legal standards governing claims

of immunity in every civil action against a foreign state.' " *NML Capital*, 573 U.S. at 141. "The key word there—which goes a long way toward deciding this case—is comprehensive." *Id. See also id.* at 141–42 ("[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.").

Petitioners claim: "The court of appeals did not dispute that U.S. courts generally can abstain when a case offends international comity" (Petitioners' Brief, 45), but Petitioners never put that question to the lower courts; instead, they argued in favor of a mandatory exhaustion requirement outside the FSIA's text.[19] Pet. App. 16–21; 79–83. The court of appeals decision actually under review was correct. Petitioners wrongly state that the court of appeals "concluded the FSIA 'leaves no room' for comity-based abstention when an FSIA exception applies." Petitioners' Brief, 45–46. The court of appeals in fact held that "the FSIA . . . leaves no room *for a common law exhaustion doctrine* based on the very same considerations of comity." Pet. App. 20 (emphasis added). *See also* Petitioners' Brief, 13

[19] *See Philipp et al. v. FRG et al.*, Nos. 17-7064, 17-7117 (D.C. Cir.), Brief for Appellants, 65 ("The district court erred in finding the claims justiciable despite Plaintiffs' failure to exhaust remedies in Germany or 'show a powerful reason to excuse the *requirement*.' ") (emphasis added). Petitioners framed the question even more squarely in their petition for rehearing *en banc*, wherein they opposed the panel's conclusion "that international comity did not require Plaintiffs to exhaust remedies in German courts before suing Germany and the SPK in U.S. courts[.]" *Philipp et al. v. FRG et al.*, Nos. 17-7064, 17-7117 (D.C. Cir.), Petition For Rehearing *En Banc* at 7.

(incorrectly stating that "The court of appeals acknowledged the comity abstention principle, but believed the FSIA made it unavailable to foreign sovereign defendants.").

Germany's exhaustion argument was an immunity defense because it was based on the respect due to it, as a fellow sovereign, when faced with a suit abroad. *See Philipp et al. v. FRG et al.*, Nos. 17-7064, 17-7117 (D.C. Cir.), Brief for Appellants, 65 ("International law requires a claimant to exhaust remedies against a foreign sovereign in that sovereign's own courts before pressing a claim against it elsewhere."); *id.* at 67 ("[C]omity preserves the working relationships between nations, showing respect to the foreign sovereign before U.S. courts take the 'extraordinary step' of forcing a sovereign to defend itself in U.S. courts.").

An exhaustion requirement would not only offer immunity beyond the text of the FSIA; it could swallow the statutory exceptions to immunity entirely. As the court of appeals explained in *Simon v. Republic of Hungary*: "So understood, enforcing what Hungary calls 'prudential exhaustion' would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts." 911 F.3d 1172, 1180 (D.C. Cir. 2018).[20] The supposed comity defense would rewrite the statute

[20] The related question of comity is before the Court in *Simon v. Republic of Hungary*, 18-1447. While there are differences in the arguments advanced to the Court by Hungary in that case from those by Petitioners here, Hungary also argues fundamentally to be excused from litigation for its status as a sovereign.

and bar—potentially in every case—the very claimants whom Congress acted to help.

Because the FSIA is comprehensive in scope, the absence of a statutory exhaustion requirement for claims under § 1605(a)(3) is conclusive. Notably, the FSIA *does* contain an exhaustion requirement for a different exception to immunity: terrorism. 28 U.S.C. § 1605A(a)(2)(A)(iii). *See* Pet. App. 18 (discussing the terrorism exhaustion requirement and explaining: "we have long recognized 'the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional.' ") (quoting *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 948 (D.C. Cir. 2008)). Germany's only timely argument was for a comity-based exhaustion requirement,[21] but it is outside the FSIA's text, so it "must fall." *NML Capital*, 573 U.S. at 142.

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[21] Even outside the FSIA's text, the common law does not require private plaintiffs to exhaust remedies in a sovereign defendant's territory. Below, Petitioners relied upon a misreading of the Restatement (Third) of Foreign Relations that concerns state-versus-state claims, as further misinterpreted in *Fischer v. Magyar Allamvasutak Zrt*, 777 F.3d 847, 855, 858, 863 (7th Cir. 2015) (relying upon the Restatement for the supposed exhaustion requirement). *Fischer* was the cornerstone of Petitioners' comity argument below, and was called out specifically by the later Restatement as wrongly decided. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS: SELECTED TOPICS IN TREATIES, JURISDICTION, AND SOVEREIGN IMMUNITY, § 455, Reporter's Note 11 (2018). The United States agrees: "The Seventh Circuit, however, mistakenly described its application of comity principles as 'impos[ing] an exhaustion requirement that limits where plaintiffs may assert

B. Petitioners' New Comity-Based Abstention Proposal Rehashes Their Un-Appealed *Forum Non Conveniens* Argument.

Petitioners now claim that the District Court should have exercised its "discretion to abstain from adjudicating [certain] cases." Petitioners' Brief, 41. The particular discretionary abstention that Petitioners urge, based on balancing various interests, is already available under the doctrine of *forum non conveniens*, and Petitioners already asserted it. "Forum non conveniens is a discretionary doctrine that permits a federal court to dismiss an action in favor of its resolution in a court of [a] foreign state." Pet. App. 83. The *forum non conveniens* framework guides courts as they consider the interests of both possible forums, together with convenience of witnesses and the plaintiff's choice of forum. Not only does this doctrine allow a court to "decline jurisdiction over a case of great concern to a foreign sovereign, regardless of the identity of the parties" (Petitioners' Brief, 46–47), but it instructs courts in how to balance that interest against other competing values. The existence of *forum non conveniens* also undermines any argument for an additional abstention doctrine.

Petitioners' demand for comity is merely their earlier *forum non conveniens* argument by another name. To the District Court, Germany argued that the case should be litigated in Germany because it "concerns

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their international law claims.'" Brief of U.S. as Amicus Curiae, 20 n.2 (quoting *Fischer*, 777 F.3d at 857).

events that took place in Germany involving German nationals; it centers around a collection of historically significant German artifacts displayed in one of Germany's most prominent museums; and it implicates Germany's profound ethical and moral commitment to ensure that the victims of Nazi persecution obtain restitution of Nazi-looted art." Defendants' Motion to Dismiss the Plaintiffs' First Amended Complaint at 51–52, *Philipp v. Fed. Rep. of Germany*, No. 15-cv-00266 (CKK) (D.D.C. 2017) ("Defendants' Motion to Dismiss").

The same arguments reappear, now as "comity": "Respondents ask a U.S. court to judge the propriety of Germany's actions within its own borders toward its own nationals"; "Respondents want a U.S. court to order Germany to relinquish cultural property in Germany to parties residing outside of Germany"; and "Respondents' claims also implicate Germany's efforts over the past seventy-five years to address the most reprehensible period of its history and to provide redress to victims of that time." Petitioners' Brief, 50.

To the District Court, Germany argued that the case "lacks any 'significant connection' to D.C." Defendants' Motion to Dismiss, 62. Now, in furtherance of its comity argument, Germany argues that there are only minimal "factual tie[s] to the U.S." Petitioners' Brief, 54. The District Court acknowledged "Germany's interest in adjudicating claims like the ones in the instant

action" but "decline[d] to exercise its discretion to dismiss Plaintiffs' claims under the doctrine of forum non conveniens." Pet. App. 91, 92. Having declined to appeal those arguments, Germany may not make them now again merely by giving them a new doctrinal title.

C. Comity-Based Abstention Is Rare and Controversial.

1. Petitioners' new theory that "this case should have been dismissed under principles of comity, which give courts discretion to abstain from adjudicating [certain] cases" is just that: new. To the extent that Petitioners advocate for an abstention doctrine separate from *forum non conveniens*, that argument was not presented to the District Court and is now forfeited. *See*, *e.g.*, *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772–73 (2015) ("Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below. . . . The Court does not ordinarily decide questions that were not passed on below.").

Petitioners cite a few cases where international comity was invoked as a standalone basis for abstention in private suits principally in the ATS context. This defense is unusual, unwieldy, and rarely appropriate even in the private context. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conserv. Dist v. United States*, 424 U.S. 800, 817 (1976). "The doctrine of abstention, under which a District Court

may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).

As the Third Circuit explained: "Absent true conflicts, a judgment from a foreign court, or parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006). The federal courts' "'virtually unflagging obligation' to exercise the jurisdiction granted to [them] . . . is not diminished simply because foreign relations may be involved[.]" *Id.* at 394 (internal citations omitted) (quoting *Col. River*, 424 U.S. at 817); *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 621–62 (9th Cir. 2014) (Zilly, J., dissenting and agreeing with *Gross*).

This obligation to exercise jurisdiction is so important that the Second Circuit has cautioned against comity-based abstention even when there is an ongoing, parallel proceeding abroad. "The mere existence of parallel foreign proceedings does not negate the District Courts' 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (quoting *Colorado River*, 424 U.S. at 817). "[E]xceptional circumstances [must] exist [to] justify the surrender of that jurisdiction." *Id.* at 93. "In weighing the considerations for and against abstention, a court's 'heavy obligation to exercise jurisdiction'

exists regardless of what factors are present on the other side of the balance." *Id.* (quoting *Colorado River*, 424 U.S. at 820).

Moreover, in the absence of concluded or pending proceedings abroad, or a bilateral treaty definitively resolving the question (of the sort that Germany has pointedly never signed with respect to Nazi-looted art, in contrast to its resolution of banking claims, for example), there is no practicable way for courts to implement a freestanding comity defense. When comity is untethered from any clear doctrine, it is "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith." Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982) (quoted by, *e.g.*, *Royal & Sun Alliance Ins. Co. of Can.*, 466 F.3d at 92); *see also Mujica*, 771 F.3d at 603 ("Beyond the question of true conflict, courts have struggled to apply a consistent set of factors in their comity analyses. As one commentator has observed, because there is 'no clear analytical framework for its exercise, . . . courts have been left to cobble together their own approach to [international comity].' ").

2. Even if this freestanding comity defense had developed into a manageable doctrine, it could not be imported to the FSIA because the statute itself already strikes the balance of relevant interests; sovereigns are immune as a matter of comity unless, and only unless, the claims fall into one of the limited exceptions

of the law whose burden on international relations Congress chose to shoulder.

The Court long ago made clear that what might otherwise be considered the privileges of sovereignty must yield at some point to the jurisdiction granted by Congress. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522 (1987) (French blocking statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."). Here, Petitioners' defense is based on those very demands for "grace and comity on the part of the United States" that the FSIA itself embodies. Petitioners still demand the privilege for the Prussian Foundation of not having to defend the suit because it is too important *as a sovereign*. *NML Capital*, 573 U.S. at 140 (quoting *Verlinden*, 461 U.S. at 486). The Prussian Foundation cannot evade the FSIA's preemptive force by shifting its argument from a mandatory exhaustion doctrine to discretionary abstention; it is still seeking sovereign immunity. *See* 1976 Hearing at 25 (testimony of Monroe Leigh). Even if not directly preempted, the comity sought would be "inadmissible" because it is "contrary to [the U.S.] policy" enshrined in the FSIA. *Hilton*, 159 U.S. at 165 (quoting *Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839)).

Petitioners' "cobble[d] together . . . approach" includes such factors as "the foreign policy interests of the United States" and "any public policy interests[.]" *Mujica*, 771 F.3d at 604. Those considerations closely

mirror the "factor-intensive" immunity regime that the FSIA displaced. As the Court has observed, the period between the 1952 Tate Letter and the enactment of the FSIA had been "bedlam" in no small part because the determination of immunity was still entirely a matter of sovereign largesse based on unarticulated standards. *NML Capital*, 573 U.S. at 140–41. The criteria used were not defined and the results were inconsistent. Congress stepped in to impose order.

Petitioners' argument that a United States court should extend "grace and comity" by declining to hear a case against a foreign sovereign despite jurisdiction under the FSIA is an attempt to unravel that law's "comprehensive set of legal standards" governing sovereignty-based abstention. *See NML Capital*, 573 U.S. at 141. If allowed, it would thwart Congress's attempt to "abate the bedlam" by resolving these issues by statute.

It is certainly true, but irrelevant, that defenses available to "private individual[s] under like circumstances" remain available to foreign sovereigns. 28 U.S.C. § 1606. Petitioners tried several. Section 1606 does not, however, justify the comity defense sometimes invoked in the unique ATS context. ATS claims and FSIA claims are not "like circumstances" such that an ATS defense may be asserted against an FSIA plaintiff—to the extent it is even available in the ATS context.

The ATS states, in full: "The District Courts shall have original jurisdiction of any civil action by an alien

only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. It is "a jurisdictional provision unlike any other in American law and of a kind apparently unknown to any other legal system in the world." *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 115 (2d Cir. 2010). Courts have called it "a 'legal Lohengrin,' 'no one seems to know whence it came,' and for over 170 years after its enactment it provided jurisdiction in only one case." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)). It has therefore required an unusual amount of judicial interpretation. It "places federal judges in an unusual law-making role as creators of federal common law." *Balintulo v. Daimler AG*, 727 F.3d 174, 187 (2d Cir. 2013). The ATS is entirely unlike the FSIA's carefully-drafted, comprehensive treatment of the comity owed to sovereigns as sovereigns.

The Brief of U.S. as Amicus Curiae agrees. "[T]here is no reason to assume that Congress intended" to import a controversial line of jurisprudence from "the ATS, a statute that employs different statutory language, was drafted in a different context, was enacted almost two centuries earlier, and was not considered in the context of human-rights law until after the FSIA was enacted." Brief of U.S. as Amicus Curiae, 18–19. Moreover, the ATS abstention defense did not appear until long after the FSIA was enacted. "[T]he ATS was invoked twice in the late 18th century, but then only once more over the next 167 years." *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 114 (2013).

While the Court has observed that exhaustion might be appropriate under the ATS, it has not yet held that it is. *See Sosa*, 542 U.S. at 733, n. 21. And even if the Court does, the defense would be unique to the ATS, which itself makes no provision for comity. In contrast, comity underpins the entire FSIA and is in fact the reason for the statute's very existence. Decisions creating a common law comity jurisprudence specifically for the ATS thus cannot logically be imported into the FSIA context. *NML Capital*, 573 U.S. at 141 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)); *see also* RESTATEMENT (FOURTH), § 424, Reporter's Note 10 (addressing the context of ATS jurisprudence: "No similar authority supports applying a doctrine of prudential exhaustion to international law claims under the Foreign Sovereign Immunities Act or more generally.").

3. Petitioners muddy the issue by citing to cases that address other, unrelated comity-based doctrines. None of these cases support dismissal for comity reasons of a case against a foreign sovereign where there is jurisdiction under the FSIA, and where the District Court already denied an argument for dismissal based on *forum non conveniens*. *See*, *e.g.*, *Sabbatino*, 376 U.S. at 417 (cited at Petitioners' Brief, 43; addressing the act of state doctrine); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (cited at Petitioners' Brief, 43; addressing the presumption against extraterritoriality); *Kiobel*, 569 U.S. at 115–25 (cited at Petitioners' Brief, 44–45; discussing the presumption against extraterritorial application); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (cited at

Petitioners' Brief, 43; addressing comity concerns that might apply when a court considers general jurisdiction over a foreign corporation); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 865–66 (2008) (cited at Petitioners' Brief, 44; addressing whether a case could proceed under Fed. R. Civ. P. 19(b) without the sovereign parties).

D. If the Defense Were Available, Discretionary Abstention Would Not Apply Here.

Even if this Court were to find that a freestanding, comity-based abstention defense separate from *forum non conveniens* is available in FSIA cases, the only appropriate remedy would be remand, not dismissal. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) ("Under both *Calvert* and *Colorado River*, of course, the decision whether to defer to the state courts is necessarily left to the discretion of the district court in the first instance."). Yet such an exercise would be pointless here, and should also be denied.

The Brief of U.S. as Amicus Curiae urges a remand for consideration of factors that Petitioners already litigated and abandoned. The United States suggests that "a comity analysis in this case might consider that respondents already unsuccessfully pressed their claims before a German Advisory Commission established in accordance with the Washington Conference Principles on Nazi-Confiscated Art." Brief of U.S. as

Amicus Curiae at 33. This proposal fails to confront the fact that Petitioners already explicitly sought comity-based dismissal in the District Court based upon that very mediation at the Advisory Commission. The District Court (correctly) denied Petitioners' request, and they did not appeal it. Pet. App. 16.

Petitioners assert (and the Brief of U.S. as Amicus Curiae implies) that Germany has a strong interest in hosting claims regarding crimes of the Holocaust. The interests of the United States are far stronger. America welcomed Germany's victims like Consortium members Saemy Rosenberg, Yvonne Hackenbroch (Zacharias's daughter and Alan Philipp's aunt), and the Rosenbaum and Goldschmidt families to start life over, and it has taken legislative action to address Germany's property crimes. America administered MGL No. 59 and the Monuments Men to unscramble the chaos created by Petitioner Germany. As noted above, Congress passed the FSIA, and explicitly discussed its application to Hitler's international art looting operation. Congress passed the Clarification Act to confirm emphatically that Holocaust art thefts were subject to FSIA jurisdiction. Congress passed the HVRA, the HEAR Act, and the JUST Act, making explicit findings about the illegitimacy of Petitioner Germany's actions from the day Hitler's regime began. Germany's interest in unilaterally deciding when it will return objects it does not own does not constitute an "exceptional circumstance[] [that] justif[ies] the surrender of that jurisdiction." *Royal & Sun Alliance Ins. Co. of Can.*, 466 F.3d at 93.

Moreover, abstention would not be proper because the German courts are categorically unavailable for claims of restitution of moveable personal property. Supp. App. 133–40. Dr. Stephan Meder of the University of Hanover explained that such claims are "de facto excluded" because "the laws applicable in Germany . . . contain notification deadlines that have long since expired." Supp. App. 134, 136. "The plaintiffs would therefore be excluded from asserting claims in connection with the 'Welfenschatz' collection." Supp. App. 137; *see also* Supp. App. 139 ("The German Supreme Court . . ruled—without this legal [precedent] having been reversed to the present day—that the restitution laws conclusively settle the seizure cases based on persecution actions by the Nazi regime, and that therefore restitution claims based on general civil law . . . are therefore categorically excluded."). Litigation abroad would be a dead letter and no basis to dismiss or remand the case for consideration. Petitioners' suggestion that they would waive the statute of limitations defense is misleading because the relevant German restitution laws have expired decades ago and cannot be reinstated by Petitioners.

Petitioners' own expert concedes the point. Jan Thiessen acknowledges that the discussion of the statute of limitations on Holocaust-era claims in the case of the heirs of Hans Sachs was "obiter dictum." Pet. App. 205. Mr. Thiessen was correct; the *Sachs* court went out of its way to distinguish the claim as one grounded in the uncertainty about the collection's location after the war, not a title defect arising out of

Nazi looting. The decision itself starts from the premise that Nazi-looted claims are barred, but in that one particular case the limitations period did not apply to property that was lost at the time the (then West) German restitution deadline passed; the collection did not resurface until (at the earliest) the 1960s and then only in East Germany where those heirs had no recourse. Further, the *Sachs* court itself "expressly" "declined to rule broadly" on "all cases involving National Socialist expropriated property." Pet. App. 175. According to Petitioners' expert, the case received a "critical reception in German legal literature" and has not been relied on[22] since. Pet. App. 205.

[22] In 2013, a law was proposed in the German Parliament to make restitution claims available precisely because the deadlines barred them. The law did not pass. A recent case involving a painting taken from a German Jewish collector by the Nazis noted the failed law and ruled that the claim was barred under German law. *See* OLG Frankfurt I, Zivilsenat, 1 U 196/16 (February 8, 2018). The Heirs' claims cannot be brought in Germany.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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