No. 19-351

In The Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Petitioners,

v.

ALAN PHILIPP, *et al.*,

Respondents.

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

BRIEF OF THE FLORIDA HOLOCAUST MUSEUM, RABBI JOSHUA KALEV, RABBI TOIVE WEITMAN, THE SÃO PAULO MEMORIAL OF JEWISH IMMIGRATION AND THE HOLOCAUST, AND THE INSTITUTE FOR THE DEVELOPMENT AND PRESERVATION OF CULTURE AND SELF-SUFFICIENCY (IDPCSS) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

All of the *amici curiae* are individuals or organizations which are interested in the preservation of the rule of law and in redressing violations of this rule by any governmental institution, partly to provide relief to the historically aggrieved parties, and at least of equal importance, to work toward ensuring, to the extent possible, that such violations are not repeated by current or future governmental entities. *Amici* all have an important interest in ensuring that the Court affirm the judgment of the Court of Appeals for the District of Columbia, as to do otherwise would impose an undue burden on survivors of the Holocaust and their heirs seeking justice for the persecution they suffered, and because they are concerned by the Petitioners' arguments which downplay the extent to which Nazi persecution of German Jews predated the outbreak of the Second World War.

Three (3) of the *amici* are institutions or individuals committed to the preservation of historical and cultural patrimony. All of the *amici* (both directly and indirectly) have evidenced a significant interest in preserving the memory of the Holocaust and those millions who suffered at the hands of the Nazi regime.

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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 their members made a monetary contribution to the preparation or submission of this brief. All counsel for the parties have consented to the filing of amicus briefs through communications filed with the Clerk of the Court.

Furthermore, the museum *amici* and the two distinguished religious leaders all represent and act on behalf of members of families who fled from Nazi Europe to the United States and South America and stand to face significant consequences from the Court's disposition of this case in their capacity as cultural organizations and individuals with substantial dealings with foreign national political cultural bodies.

The first of the *amici* is the Florida Holocaust Museum. The Florida Holocaust Museum is one of the largest and most well-respected Holocaust museums in the United States. The Museum is dedicated to honoring the memory of the millions of innocent men, women and children who suffered or died during the Holocaust and teaching the members of all races and cultures the inherent dignity of all human life, in order to prevent future genocides, the worst examples of ignoring the rule of law.[2]

Rabbi Joshua Kalev,[3] of Congregation Tikvat Jacob Beth Torah in Manhattan Beach, California, which in

[2] The two (2) Holocaust Museums are representative examples of the institutions that have contacted counsel for the *amici* to affirm their support for the position of the Respondents in this case. In the interest of brevity and organization, counsel chose a Florida-based museum because of the large influx of first Jewish, and then Cuban, refugees to that state. In similar fashion, counsel felt that the inclusion of a highly respected Holocaust Museum located outside of the United States would serve as strong evidence of the profound potential international consequences of the Court's ultimate disposition of this case.

[3] Rabbi Kalev and Rabbi Weitman were selected as representatives among the different synagogues across the Americas who have contacted counsel for the *amici* to indicate their support

turn is named as a co-*amicus* on this brief. As the descendant of Holocaust survivors from Germany and Poland, and as the spiritual leader of a community whose members include survivors of the Holocaust and their descendants, Rabbi Kalev (and his synagogue community) have a strong interest in assuring that the victims of Nazi persecution and their families are able to seek justice for the persecutions they and their ancestors suffered at the hands of the Nazi regime.

Rabbi Toive Weitman is the leader of the Kehilat Israel Synagogue in Bom Retiro, São Paulo, Brazil, another Brazilian co-*amicus*. In addition to working closely with Holocaust survivors and their families in the Brazilian Jewish diaspora, Rabbi Weitman is committed to the collection, preservation, and education of Jewish heritage in Brazil and the greater South American Jewish community.

The São Paulo Memorial of Jewish Immigration and the Holocaust (*Memorial da Imigração Judaica e do Holocausto*) is the most significant Holocaust museum and memorial in Brazil and one of the most respected museums of its kind in the country. The permanent collection of the Museum focuses in large part on the close relationship between Nazi expropriation and the Holocaust, both through forced sale and by direct seizure, and highlights how the expropriations of the Nazi regime accelerated the progression

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for the Respondents in this case. They were selected due to their personal connections to Holocaust survivors and their advocacy of Holocaust education in their respective communities.

from pogroms and segregation to mass killing. More broadly, the aim of the Museum is to keep alive the memory of the victims and survivors of the Holocaust, some of whose families are active members, by researching and preserving artifacts related to the Holocaust and by educating visitors on the impact and consequences of the Holocaust worldwide.

The last of the *amici*, the Institute for the Development and Preservation of Culture and Self-Sufficiency (IDPCSS), is headquartered in Los Angeles and Chicago and was founded by a group of educators, historians, attorneys, and business-people in the United States in order to work toward developing and protecting culture and increasing the self-sufficiency of the world's diverse population. Its projects include the construction of wells in rural Africa, culturally-focused educational services primarily serving communities otherwise unable to access cultural enrichment programs, and lecture programs and publications directed toward the protection and/or resurrection of cultural objects and practices where they are under threat or have been expropriated, including Nazi-looted Art.

SUMMARY OF THE ARGUMENT

It is the position of the *amici* that the Court of Appeals for the District of Columbia correctly construed the "expropriation exception" or takings clause of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), to abrogate sovereign immunity in this

case, based on the premise that the Petitioners' predecessor state violated international human-rights law in acquiring the Welfenschatz treasure from the Respondents. While technically correct in suggesting that the case involves a foreign state which took property from its own citizen(s), Petitioners would have the Court wrongly immunize all such transfers in the early stages of the Nazi takeover of Germany, despite clear statutory language and Congressional intent to the contrary, and to thus prevent the heirs of the victims of a well-documented and horrific genocide from seeking justice in our courts.

It is undisputed that by its very terms the takings exception of the FSIA abrogates sovereign immunity where "rights in property taken in violation of international law are at issue[.]" 28 U.S.C. § 1605(a)(3). Petitioners argue that the economic and market pressures placed on German Jews under Hitler's government prior to 1939 did not represent actions taken during the Holocaust as part of the Nazi's overall state-sanctioned "genocide." *Amici* are concerned that Petitioners are attempting to avoid recognizing the historically-accepted truth that the increased economic pressure and violence against German Jews in the 1933–39 period were an integral aspect of the larger Nazi plan for the complete destruction of European Jewry.

The author and statesman who first publicly used the term "genocide," the original drafters of the Genocide Convention and the statements of the original signatories to the Genocide Convention all make it clear that the so-called "economic violence" enacted

against German Jews in the first decade of Hitler's rule was an integral part of the Holocaust. As genocide is contrary to the norms of international human-rights law from which no derogation is permitted, it stands to reason that the Respondents' ancestor's sale of the Welfenschatz treasure constituted a taking by the German government in violation of international law.

It is also very significant that the FSIA itself was amended in 2016 to define the period of Nazi persecution as extending from January 30, 1933 to the end of the Second World War. *See* 28 U.S.C. § 1605(h)(3)(C). In this sense, the United States Congress in effect made it clear that the heart of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), while otherwise based on its own factual underpinnings, applied to *all individuals persecuted by the Nazis at any time that they were in power* (i.e. 1933–1945), in any country and against a citizen of the home country or an alien in that country, without any differentiation within these classifications. Petitioners, however, urge this Court to decide otherwise, without any historical, legal, or factual justification for their position. The bottom line is that the economic and societal pressures imposed on German Jews such as the Respondents' families were self-evidently an integral part of the Holocaust genocide.

Further, regardless of the fair market value of the treasure in 1935, Petitioners cannot seriously argue that Respondents' ancestors were in a position to fairly negotiate with an entity which was more than ninety percent (90%) controlled by Hitler's government. Accordingly, and despite the intrastate nature of the

Respondents' claims, the takings clause exception of the FSIA, 28 U.S.C. § 1605(a)(3), must be applied in the present context, as has consistently been done by the federal courts since the seminal decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).[4]

Additionally, the *amici* contend that the doctrine of international comity should be deemed unavailable to Petitioners, as the German state has palpably failed to provide an adequate and available alternative domestic remedy to the Respondents' claims. To impose a requirement that Respondents exhaust foreign remedies prior to filing suit in an American court would in turn impose an undue burden on the victims of the Holocaust and their heirs. Moreover, the legislative history and interpretation of the FSIA under standard canons of statutory interpretation both are contrary to the application of an international comity defense to claims under the FSIA's takings clause. Finally, the Petitioners' actions in declaring the Welfenschatz treasure a "national cultural treasure" contemporaneously with the Respondents' first filings in the present case demonstrate the Petitioners' inability to provide a good faith, unbiased, and adequate domestic framework for hearing the Respondents' claims in this matter.

[4] In the interest of full disclosure, the lead counsel of record in connection with this friend of the court brief on behalf of the current *amici*, Donald S. Burris of Burris & Schoenberg, LLP, served as co-counsel for Ms. Maria Altmann and has given over eighty (80) lectures and authored three (3) law review articles, about the case and the overall quest to recover Nazi-looted art.

ARGUMENT

The atrocities that accompanied Hitler's ascension to power in Germany are well-documented, and are taught to schoolchildren worldwide, and in many states—including Florida—are part of the required curriculum. *See* Fla. Stat. § 1003.42 (2020). Indeed, for decades, individuals everywhere have been admonished to "never forget" the horrors of the Holocaust. Nevertheless, the Petitioners' primary historical and legal argument in the present case expressly requests this Court to re-define the scope and historical record of the Holocaust. The brutalities of the Holocaust did not arise out of a vacuum, but represented the final stage of a concentrated and ongoing effort to rid Germany, Europe and the whole world of the Jewish people. This effort—which inspired the coining of the word "genocide" itself—did not begin at the outbreak of war in 1939, nor did it commence after the passage of the Nuremberg Laws of September 1935. Rather, all of these events—from the economic pressures exerted on Respondents' family members to the industrial-scale murder of innocent men, women, and children in the concentration camps—formed part of a systematic and intentional scheme to exterminate the Jewish people in Germany and elsewhere.

Petitioners urge this Court to make a determination not of law, not of fact, but of historical interpretation. Indeed, the interpretation that they urge this Court adopt—that the economic and political pressures imposed on German Jews in 1935 were insufficiently connected to the Nazi's genocidal plans to wipe

out the Jews of Europe to amount to an expropriation in violation of international law. This premise has long since been rejected by historians, as demonstrated in the briefs of other *amici* such as the Holocaust and Nuremberg Historians Peter Hayes, Omer Bartow, and Deborah Dwork. The United States Congress' express understanding of the Holocaust is also contrary to this view, as the FSIA itself was amended in 2016 to define the period of Nazi persecution as extending from January 30, 1933 to the end of the Second World War. *See* 28 U.S.C. § 1605(h)(3)(C).

Further, in light of the procedural posture of the Petitioners' appeal, the Court need not decide whether the taking *was* in violation of international law, but rather merely whether the Respondents' claims are substantial and non-frivolous. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Respondents have not yet had an adequate opportunity to present evidence on this point: as the Petitioners note in their brief, the District Court and a panel of the D.C. Circuit both merely determined that at minimum, Respondents had surpassed the requirements to survive a motion to dismiss. *See* Pet'r's Br. 7–8. For this Court to make a factual determination on the history *surrounding* the Respondents' substantive claims, as the Petitioners urge, is superfluous to resolving the substance of these claims.

I. The "expropriation exception" of the FSIA should abrogate Petitioners' sovereign immunity, as Respondents' claims concern property seized in violation of international law.

The "expropriation exception" of the FSIA abrogates sovereign immunity in cases where "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). While "as a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish jurisdiction under the FSIA's expropriation exception because the taking does not violate international law[,]" *Simon v. Republic of Hungary*, 812 F.3d 127, 144–45 (D.C. Cir. 2016), remanded, 277 F.Supp. 3d 42 (D.D.C. 2017), rev'd and remanded, 911 F.3d 1172 (D.C. Cir. 2018), cert. granted, No. 18-1447 (July 2, 2020), such a scenario does not exist in the present case. Rather, the Respondents' intrastate takings claim is distinguishable because the taking was within the context of the Holocaust, genocide of unimaginable scale. Accordingly, the Court should affirm the decision of the Court of Appeals for the District of Columbia because the Respondents' claims meet this threshold, given the historical context of the Prussian state's acquisition of the Welfenschatz and the fact that genocide is a violation of international human-rights law from which no derogation is permitted.

A. The economic pressure placed on German Jews in the 1933–39 period must be considered an aspect of the Holocaust.

As *amici* Holocaust and Nuremberg Historians (the "historian *amici*") note,[5] the discrimination and socio-economic pressures imposed on German Jews in the 1933–39 period were such that any property transferred from Jewish hands to the German state following Hitler's ascension to the Chancellorship must be presumed to have been ceded under express or implicit duress. Br. of Holocaust & Nuremberg Historians as *Amici Curiae*, at 6–9. In a contradictory manner, Petitioners acknowledge that "Nazi persecution of the Jews . . . undisputedly began shortly after Hitler seized power[]" in 1933, yet appear to argue that this persecution with genocidal intent that falls short of actual killing of German Jews was not part of the Holocaust itself. Pet'r's Br at 37. As the historian *amici* thoroughly explain, "[p]roperty theft and appropriation were not tangential or opportunistic in the Nazi program[]" but rather reflected an organized, official, and overt "pressure to sell" assets owned by German Jews "to 'Aryans' at under market value." Br. of Holocaust & Nuremberg Historians as *Amici Curiae* at 19; *see id.* at 21–25 (outlining the consecutive pressures and limitations imposed on German Jewish art dealers

[5] Given the historical nature of this matter, and the expertise of the Holocaust and Nuremberg Historians acting as *amici curiae* in support of neither party, *amici* in this Brief defer to their characterization of the historical situation in Germany 1933–39.

and collectors of cultural property from January 1933 to June 1935).

When Raphael Lemkin coined the term "genocide" in 1943, he expressly stated that measures aimed at destroying "the economic existence of national groups[]" were within the ambit of its definition. Raphael Lemkin, *Axis Rule in Occupied Europe* 79 (1943). Along with two other individuals, Lemkin prepared the draft Genocide Convention for the United Nations following the war; this draft included "confiscation of property[]" and "looting" as examples of actions which could in aggregate constitute a genocide. Draft Convention on the Crime of Genocide, Art. I (II), E/447 (1947). As defined by Article 2 of the adopted Genocide Convention, genocide includes a series of actions "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group," Convention on the Prevention and Punishment of the Crime of Genocide, 102 Stat. 3045 (Dec. 9, 1948), by means including but not limited to "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[,]" *id.* art. 2(c). *See also* U.N. ESCOR, 8th Sess., 72nd mtg. at 82 (Oct. 12, 1948) (statement by Yugoslavian delegation that "genocide was always preceded by a number of preliminary acts[,]" and that "[i]t was essential to combat genocide in all its forms, not merely at the last stage," when the killing of individuals begins).

While the Genocide Convention requires a showing of specific intent to "[d]eliberately inflict [] 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, art. 2(c), Dec. 9, 1948, 102 Stat. 3045, the Court does not need to find that such an intent did exist in regard to the circumstances surrounding the Petitioners' acquisition of the Welfenschatz, nor that the sale was an act in furtherance of a genocidal scheme by the Nazi government. Rather, all that the Court needs find is that such a possibility was alleged in Respondents' claims in a substantial and non-frivolous manner. *Siderman de Blake*, 965 F.2d at 711.

B. Genocide is a violation of international human-rights law from which no derogation is permitted.

While traditional international law was not considered applicable to the relations between a sovereign and its own citizens, in the aftermath of the Second World War certain norms were internationally recognized in order to "protect individuals from inhuman treatment by states, even if the [offending] state is that state whose nationality the individual has." 1 Oppenheim's Int'l Law 851. At Nuremberg, prior to the enactment of the Genocide Convention, the International Tribunal clarified that "to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime." R. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946). "[T]he condemnation of genocide as contrary to

international law quickly achieved broad acceptance by the community of nations" in this period, as evinced by the 1948 Genocide Convention. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995); Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 102 Stat. 3045 (Dec. 9, 1948). As stated by the Ninth Circuit, "genocide, enslavement, and other inhumane acts" punished at Nuremberg "are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*." *Siderman de Blake*, 965 F.2d at 715.

"A *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted[.]'" *Princz v. Federal Rep. of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quoting *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1998)). *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679. *Jus cogens* are "nonderogable and enjoy the highest status within international law," *Committee of U.S. Citizens in Nicaragua*, 859 F.2d at 940. Accordingly, *jus cogens* "prevail over and invalidate international agreements and other rules of international law in conflict with them[.]" Restatement (Third) of the Foreign Relations of the U.S., § 102 comment k (Am. Law Inst. 1987). As "[b]y the time of the expropriation exception's enactment in 1976 as part of the FSIA, genocide had long been identified as an international-law crime—as evidenced by the Genocide Convention, article 2, adopted in 1948[ ]"—and courts have held that "the term 'international law' in the

FSIA's expropriation exception . . . encompasses genocide." *Simon*, 812 F.3d at 145–46. As the pre-FSIA understanding of genocide encompassed "confiscation of property[,]" Draft Convention on the Crime of Genocide, Art. I (II), E/447 (1947), and other "number of preliminary acts[,]" U.N. ESCOR, 8th Sess., 72nd mtg. at 82 (Oct. 12, 1948) (statement by Yugoslavian delegation), it stands to reason that the meaning of "in violation of international law" in 28 U.S.C. § 1605(a)(3) encompasses genocide as one such violation.

C. Congress intended the time frame during which the Welfenschatz was sold to be considered integral to the Holocaust.

In addition to the takings clause's applicability to the Respondents' claims under the plain meaning of 28 U.S.C. § 1605(a)(3), there is clear Congressional intent for the takings exception to apply for claims of the same nature as the Respondents' claims—claims involving the transfer of ownership of art and cultural artifacts from German Jews to the German state under the Nazi government. In December 2016, Congress passed legislation clarifying the scope of the FSIA as related to cultural property claims, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (Dec. 16, 2016).

This statute was designed in response to a restitution action brought under the FSIA takings exception, *Malewicz v. City of Amsterdam*, in which the heirs of the artist Kazimir Malewicz were permitted to bring

suit against the City of Amsterdam after it unjustly acquired several of his artworks in 1958 without paying just compensation. 517 F. Supp. 2d 322, 325 (D.D.C. 2007). Because the artworks in question had come under the jurisdiction of the United States while loaned to an American museum as part of a cultural exchange, and because the District Court determined that this exchange was a sufficient commercial activity to satisfy the "commercial activity" requirement of 28 U.S.C. § 1605(a)(3), the District Court for the District of Columbia determined that the FSIA's takings exception applied. *Id.* at 340. The artist's heirs and the City of Amsterdam subsequently settled out of court before an appellate record could be created.

In reaction to this decision, Congress amended the FSIA to prevent future suits brought on the basis of a cultural exchange program. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (Dec. 16, 2016). In doing so, Congress recognized the pre-2016 applicability of 28 U.S.C. § 1605(a)(3) to an art-related takings claims under the FSIA, and sought to limit the scope of the takings exception. *See* 28 U.S.C. § 1605(h). In narrowing the scope of Section 1605(a)(3), however, Congress expressly and intentionally created an exception for Nazi-era takings, defined as "action[s] based upon a claim that [a] work was taken in connection with the acts of a covered government during the covered period[.]" 28 U.S.C. § 1605(h)(2)(A)(ii). The "covered government" was defined as the German or any collaborationist government in power during the "covered period[,]" *id.*

§ 1605(h)(3)(B), which in turn was defined as "the period *beginning on January 30, 1933*, and ending on May 8, 1945[]"—that is to say, the entire tenure of Adolf Hitler as German Chancellor, *id.* § 1605(h)(3)(C) (emphasis added). Accordingly, there exists a clear record of the Congressional understanding that the illegal expropriations of the Nazi government in Germany and elsewhere in Europe began in 1933, when Hitler became chancellor—that is to say, two years before the sale of the Welfenschatz. *Id.*

II. The fact that the German entity expropriated the Welfenschatz from its own citizens should not affect the outcome of this appeal.

Even though the Welfenschatz was taken from Jewish German citizens by the German government, this intrastate taking was "in violation of international law." 28 U.S.C. § 1605(a)(3). Customary international law dictates that a taking is illegal if it was not for a public purpose, was "arbitrary or discriminatory in nature[,]" or if no just compensation was provided for the expropriated property. H.R. Rep. 94-1487 (1976), at 19–20. Amendments to the FSIA over the past three decades evince a Congressional intent to categorize claims arising from Holocaust-era expropriations as meriting an abrogation of sovereign immunity, given the clearly discriminatory and illegal nature of these actions. *See* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (Dec. 16, 2016); Holocaust Expropriated Art

Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (Dec. 16, 2016); Holocaust Victims Redress Act, Pub. L. No. 105-158, Tit. II § 201, 112 Stat. 15 (Feb. 13, 1998).

For example, and in addition to the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act discussed *supra*, in 2016 Congress passed the Holocaust Expropriated Art Recovery (HEAR) Act, which was intended to provide victims of Holocaust-era persecution and their heirs a fair opportunity to bring suit to recover works of art confiscated or misappropriated by the Nazis, by temporarily imposing a uniform six-year statute of limitations period after actual knowledge of a claim arises. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524 (Dec. 16, 2016). While this statute does not directly touch on the issues related to the Respondents' claims, it is merely one additional act of legislation in a series of acts—from 1998 to present—which evince a strong Congressional intent to allow the victims of Nazi persecution and their heirs to seek justice in American courts. Moreover, like the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act discussed *supra*, the HEAR Act defines the "covered period" of Nazi persecution as running from January 1933 through the end of the Second World War in 1945. *Id.* § 4(3).

The political and economic pressures placed on German Jews in the early years of Hitler's government—from his ascension as chancellor in 1933 to the outbreak of World War II in 1939—are historically accepted to be an integral aspect of the genocide known

as the Holocaust, and it was under such conditions that the Welfenschatz was acquired by the Prussian state. The "Aryanization" of German cultural heritage property such as the Welfenschatz was nakedly discriminatory in nature, and did not serve a legitimate public interest of the German state. Indeed, for over twenty years Congress has opined that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish . . . heritage[,]" Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15 (1998), and that the Nazi seizure, forced sale, and other acquisition "of works of art and other property throughout Europe" was a key "part of their genocidal campaign against the Jewish people[,]" Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524 (Dec. 16, 2016). Indeed, "it is doubtful that any state has ever violated *jus cogens* norms" such as genocide and mass looting of cultural heritage "on a scale rivaling that of the Third Reich." *Princz*, 26 F.3d at 1174; *see also* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. Cal. L. Rev. 833, 834 (1990). As genocide is a *jus cogens* from which no derogation is permitted, any transaction between German Jews and the German state during this era must be viewed as highly suspect—and in the present case, the Welfenschatz sale was sufficiently suspect as to merit survival past a motion to dismiss.

III. International comity cannot shield Petitioners from liability, as the German State cannot provide an adequate and available alternative domestic remedy to the Respondents' claims.

As a fundamental matter of access to justice and as a matter of law, the Petitioners cannot be shielded from liability in U.S. courts under the doctrine of international comity, for three reasons. First and most concerning to *amici*, as a matter of access to justice, the requirement to first litigate in a foreign forum imposes an undue barrier to justice on the victims of Nazi persecution and their heirs. Second, the statutory construction of the FSIA itself forecloses the possibility of raising international comity as a defense against a claim under the takings exception, 28 U.S.C. § 1605(a)(3). Finally, a claim of international comity requires that the Petitioners provide an adequate and available alternative domestic remedy to the Respondents' claims, and the Petitioners' actions evince an inability and a lack of intention to do so.

A. Invoking the defense of international comity in this case would impose an undue burden on plaintiffs seeking redress of Nazi persecution.

Were the Petitioners to prevail in dismissing the Respondents' claims under the doctrine of international comity, the burden placed on future claims by victims of Nazi persecution and their heirs would outweigh the resources of the vast majority of interested

parties. As the Court noted in its 2004 decision in *Republic of Austria v. Altmann*, some foreign jurisdictions impose court costs "proportional to the value of the recovery sought[,]" which—as it was in *Altmann*—can easily be "an amount beyond [the victim's or victim's heirs'] means[.]" 541 U.S. at 685. Ironically, a victim of genocide or their heirs may be unable to afford the court costs associated with recovering their expropriated property *because of* the initial expropriation and because of that sovereign's complicity with the Nazi regime. Accordingly, as a fundamental matter of access to justice, it does not follow that a victim of the unimaginable horrors of the Holocaust or their heirs should be denied redress because the "genocide, enslavement, and other inhumane acts" inflicted upon them by the Nazi government included the expropriation of valuable works of art and cultural heritage, and the resulting court costs are correspondingly high. *Siderman de Blake*, 965 F.2d at 715.

Amici, as cultural institutions and organizations whose members are dedicated to honoring the memory of the millions of innocent men, women and children who suffered or died during the Holocaust, fear that the financial burden resulting from the Petitioners' successful defense of international comity would prevent other worthy claimants from seeking justice in the future. Further, and contrary to the representations of the Petitioners, it is the position of *amici* that the Respondents are correct in urging that the decision of the Court of Appeals for the District of Columbia should be affirmed and would *not* unfairly affect the

reach of the takings exception to the FSIA, 28 U.S.C. § 1605(a)(3), and set a new and lower bar for the current owners of admittedly looted cultural works to establish their right to retain the looted property against the claims of the victim (whose ranks are self-diminishing with the passage of time) and their families.

B. The plain meaning of the FSIA and the interpretation of its terms' meaning reject the use of the international comity defense in connection with takings claims.

Beyond equitable considerations of access to justice, the Petitioners should be barred from raising the defense of international comity in the present case because the statutory construction of the FSIA forecloses such a possibility. As this Court has held in the past, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text." *Republic of Argentina v. NML Capital, Ltd.*, 572 U.S. 134, 141–42 (2014). The structure of the takings exception, 28 U.S.C. § 1605(a)(3), in relation to the rest of the FSIA indicates from the text alone that there is no exhaustion requirement plaintiffs must meet prior to filing suit in American courts. *Compare* 28 U.S.C. § 1605A(a)(2)(A)(iii) (requiring the claimant to "afford [] the foreign state a reasonable opportunity to arbitrate the claim" in a domestic forum) *and* 28 U.S.C. § 1605 (imposing no such exhaustion requirement). The statutory construction of the FSIA forecloses the

defense of international comity against a claim under Section 1605(a)(3) for two reasons.

First, there is no statutory or implied right of a sovereign to require domestic exhaustion of an individual private plaintiff's claims, either under the FSIA or customary international law. While the Petitioners pointed to 28 U.S.C. § 1606 as a statutory basis for invoking international comity, this provision "permits only defenses, such as forum non conveniens, that are equally available to 'private individual[s],'" and "[o]bviously a 'private individual' cannot invoke a '*sovereign's* right to resolve disputes against it.'" *Philipp v. Fed. Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018). Similarly, while the Seventh Circuit has stated that the "exhaustion of domestic remedies is preferred in international law as a matter of comity[,]" *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015), the draft of the Restatement (Fourth) of Foreign Relations Law of the United States and precedent from other Federal Circuits both indicate that this doctrine applies to "nation vs. nation litigation," not claims by private individuals, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 949 (D.C. Cir. 2008); Restatement (Fourth) of Foreign Relations Law of the U.S. § 455 Reporters' Note 9 (Am. Law Inst., Tentative Draft No. 2, 2016). Accordingly, the Petitioners are not entitled to the defense of international comity under these theories.

Second, the statutory construction of the FSIA's takings exception indicates that Congress did not intend to permit a foreign sovereign to raise the defense

of international comity. It is a standard canon of statutory interpretation 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[.]" *Chabad*, 528 F.3d at 948. Looking to the FSIA, while the *terrorism exception* under 28 U.S.C. § 1605A(a)(2)(A)(iii) requires the claimant to "afford [ ] the foreign state a reasonable opportunity to arbitrate the claim" in a domestic forum, no such language exists in the *takings exception* under 28 U.S.C. § 1605(a)(3). Thus, while Congress could have created such a requirement under 28 U.S.C. § 1605 contemporaneously to its enactment of 28 U.S.C. § 1605A, it chose not to; the logical extension of Congress's decision not to do so is that it did not intend for the defense of international comity to extend to claims under the FSIA's takings exception.

C. Petitioners' actions leave serious doubt as to the adequacy and availability of alternative remedies.

In addition to the equitable and textual considerations preventing Petitioners from invoking the defense of international comity, the Petitioners' own actions leave serious doubts as to the availability under Petitioners' jurisdiction of a fair alternative remedy for Respondents' claims. In 2014, the Respondents sought restitution of the Welfenschatz through the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (the "Advisory Commission").

Philipp, 894 F.3d at 410. In March 2014, the Advisory Commission chose to "not recommend the return of the Welfenschatz to the heirs[.]" *Id.* (citing the Recommendation Concerning the Welfenschatz (Guelph Treasure) (Mar. 20, 2014), Appellants' Supp. Sources 7). On February 6, 2015, "the State of Berlin designated the Guelph Treasure as cultural property of national significance[,]" meaning that "[u]nder the German Act to Protect German Cultural Property against Removal (Kulturgutschutzgesetz), removing the pieces from Germany—even for exhibition purposes—is now only possible with authorization from the German Federal Government Commissioner for Culture and the Media." Stiftung Preußischer Kulturbesitz, *What Is the Guelph Treasure?* (2020), https://www.preussischer-kulturbesitz.de/newsroom/dossiers-and-news/all-dossiers/dossier-the-guelph-treasure/what-is-the-guelph-treasure/?L=1.

Given this action by Petitioners through their political subdivision of the State of Berlin, which evinces a complete unwillingness of Petitioners to even consider the possibility that Respondents would be afforded fair and unbiased relief in German domestic courts, the Respondents filed suit at the District Court for the District of Columbia two weeks later, on February 23, 2015. *See* J.A. at 1 (listing filing date for first complaint). Thus, the Respondents sought relief through the American legal system *because of* the unavailability of an adequate and available alternative remedy in German court, rather than filing in American courts regardless of the opportunity to seek such a

remedy in German court. Accordingly, the doctrine of international comity cannot act as a defense to shield Petitioners from liability in this case, as a matter of basic fairness and equity.

CONCLUSION

For all of the reasons set forth in this Brief, Respondents' Brief and the appellate record, *amici* respectfully request that the Court affirm the decision of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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