No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, *et al.*,

Petitioners,

v.

ROSALIE SIMON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AAJLJ) AND OTHER ADVOCATES FOR HOLOCAUST RESTITUTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I. Statement of Interest

The American Association of Jewish Lawyers and Jurists ("AAJLJ"); the Jerusalem Institute for Justice ("JIJ"); the Staten Island Trial Lawyers' Association ("SITLA"); Hadassah Women's Zionist Organization of America ("Hadassah"); International Association of Jewish Lawyers and Jurists ("IJL"); Touro College Institute on Human Rights and the Holocaust ("IHRH"), Heideman, Nudelman and Kalik, P.C. ("HNK") and the Israel Forever Foundation ("IFF") submit this amicus curiae brief in support of the Respondents.[1]

The AAJLJ is an association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the IJL. The AAJLJ's mission includes representing the human rights interests of the American Jewish community in regard to legal issues and controversies that implicate the interests of that community, such as the issues in this case. A central part of the AAJLJ's mission relates to the Holocaust. The AAJLJ sponsors educational programs and lectures, publishes articles, and publicly recognizes individuals and organizations that work on behalf

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and no one other than *amicus curiae* or its counsel contributed money to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, both parties have filed with the Clerk letters of blanket consent to the filing of amicus briefs in this case.

of Holocaust victims such as Elie Wiesel, Simon Wiesenthal and The Wiesenthal Foundation. The AAJLJ also seeks legal remedies to achieve justice for victims and their heirs through its participation in legal cases in the United States and Israel. The AAJLJ's mission statement, "Justice, Justice Shall You Pursue" (Deuteronomy 16:20) compels our support of the Respondents in this case, who deserve a true and honest account of historical events and are due Justice under American law.

The JIJ is a legal and research institute dedicated to cultivating and defending human rights, the rule of law and democracy. JIJ works in the international legal arena to fight anti-Semitism and present charges against perpetrators of heinous crimes against humanity to tribunals and governmental bodies. JIJ's legal work includes defending victims of anti-Semitic attacks in Europe. JIJ is a coalition member in the efforts to promote the International Holocaust Remembrance Alliance working definition of anti-Semitism. Seeking justice for Holocaust survivors is central to JIJ's work in Israel and around the globe.

SITLA is a bar association whose mission statement is to foster ethics, education, and goodwill in the community. SITLA strives to educate people about the Rule of Law, Equal Justice, and the basic human rights of all people. In carrying out SITLA's Mission Statement, it has provided forums and internship programs with a focus on genocide, specifically the Holocaust. SITLA's members are encouraged to engage members of the community,

specifically young people, about the power of the Rule of Law.

Hadassah was founded in 1912. It is the largest Jewish and women's membership organization in the United States, with over 300,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of advocating for the rights of women and the Jewish community, including combating antisemitism in the US and around the world. Hadassah proudly passed a policy statement on Holocaust Restitution in 2003 emphasizing that the continued effort to compensate the survivors and heirs of Holocaust victims for the most horrific event in this century is obligatory. Hadassah was recently a leading advocate for the Never Again Education Act. For years, Hadassah worked hand-in-hand with bill sponsors in the House and Senate to drive momentum for the Act and thousands of Hadassah supporters from across the country urged policymakers to cosponsor this vital legislation.

The IJL was founded in 1969 to promote human rights, fight genocide, and combat all forms of racism, including specifically anti-Semitism. Its founders include Supreme Court Justices Haim Cohn of Israel, Arthur Goldberg of the United States and Nobel Prize laureate René Cassin of France. Today it comprises several hundred distinguished members, including lawyers, judges, judicial officers and academic jurists, from more than

15 countries, who are active locally and internationally in various human rights and international law issues. The IJL has a United Nations ECOSOC Special Consultative status as a non-governmental organization (NGO). In this capacity, IJL representatives have been actively involved in the work of the Human Rights Council, the Office of the High Commissioner for Human Rights and other related bodies for over 15 years. Among the IJL's focuses today is fighting anti-Semitism in all of its various manifestations around the world.

The IHRH is a center, founded in 1999, whose mission and programming reach across the wide spectrum of disciplines within the Touro College and University System. Through education and training, the IHRH works to understand, explore and evaluate contemporary mechanisms for protecting human rights and the rule of law in view of the lessons of the Holocaust and its aftermath. The IHRH uses the lessons of the Holocaust to advance and promote effective advocacy and representation of those whose human rights have been violated.

HNK, based in Washington, DC, is a global firm with affiliates in various parts of the world. HNK has been involved in Holocaust-era assets litigation involving the Swiss National Bank and other matters. HNK has filed an Amicus Brief with the International Court of Justice regarding Israel's terrorism-prevention security fence in support of Israel's right to self-defense and recently filed an Amicus Brief with the International Criminal Court. When the government of Poland adopted the

Holocaust Speech law that prohibited accusations of complicity, HNK filed an amicus brief with the Polish Constitutional Tribunal. HNK Senior Counsel Richard D. Heideman previously served as President, B'nai B'rith International and served for five years as Chair of the United States Holocaust Memorial Museum Washington Lawyer's Committee; as well as Chair of the Institute for Law and Policy at the Hebrew University Faculty of Law. Heideman co-chaired the Nuremberg Symposium at Jagellonian University in Krakow, sponsored by the International March of the Living, on the Nuremberg Laws and Nuremberg Trials, which has been published as a special Nuremberg edition of the Loyola of Los Angeles International & Comparative Law Review.

IFF is a non-profit and non-governmental charitable 501c(3) organization with offices in Washington, DC and Jerusalem. IFF's Executive Director Dr. Elana Heideman, Ph.D. is a world-renowned educator and lecturer with nearly 30 years of experience in Holocaust and Jewish education. She earned her Ph.D. in Holocaust Studies, Phenomenology and Memory from Boston University under the direct mentorship of Professor Elie Wiesel and has served as an educator and consultant with numerous organizations including the International March of the Living, and Yad Vashem in Jerusalem. She also leads IFF's Links of the Chain Initiative, which encourages members to learn, understand, remember, and transmit the lessons of the Holocaust through reflective resources and experiential

programs that open portals to Jewish life in the shadow of death, and to explore the connection between Holocaust, hope and Israel in an effort to remember and make meaning out of recent Jewish history.

II. Summary of Argument

Hungary's cooperation with Nazi Germany in the brutal massacre of the Jewish population within its wartime borders was a crime of massive proportions. More than half a million Jews were murdered. Only a small fraction of the community survived.[2] Raoul Wallenberg Centennial Celebration Act, 31 USC § 5111; State Department Office of the Special Envoy, *The JUST Act Report* (Mar. 2020), available at *https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf* ("2020 Just Act Report"), p. 84. The Nuremberg Tribunal found that "by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz" alone. International Military Tribunal, Judgment of October 1, 1946, in The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany ("*Major War Criminals*"), p. 466.

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[2] Aside from Wallenberg, history records other Righteous Among the Nations, including Ernst Vonrufs and Peter Zürcher, whose actions saved many Jewish lives in Hungary. *See* Yad Vashem, Vonrufs Ernst, available at *https://righteous.yadvashem.org/?searchType=righteous_only&language=en&itemId=4018114&ind=NaN (last accessed October 26, 2020).*

Respondents in this case survived detention and slave labor at camps including Auschwitz, Bergen-Belsen, Dachau, Gross-Rosen, Mauthausen, Ravensbrück, and Theresienstadt. Dozens of their family members were murdered. Their statements reflect violations of international criminal law including cruel treatment, torture, persecution, forcible transfer, deportation, murder, extermination, and genocide. Joint Appendix, pp.127-144.

This was just one part of the genocide of six million of Europe's Jews pursuant to what Justice Jackson described as "a plan and design. . . to annihilate all Jewish people", adding "History does not record a crime ever perpetrated against so many victims or one carried out with such calculated cruelty." Second Day, Wednesday, 11/21/1945, Part 04, in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. Nuremberg: IMT, 1947. pp. 98-102.

Since Nuremberg, United States law has rightly treated these crimes as unique in their gravity and scale. The United States has effectuated its national interest in facilitating justice and restitution for these crimes by allowing survivors and their heirs to pursue claims in American courts. While the looting of Respondents' property cannot be compared to the murder of millions of people, it was an integral part of the genocide and as such constituted a taking in violation of international law, whose victims are entitled to pursue their claims in American court under FSIA's plain language.

This Court should not overturn that consistent practice or get back into the business of "immunity by factor balancing" just to second-guess the policy-making branches' determination that restitution for Holocaust survivors is in our national interest.

III ARGUMENT

A. These Were Genocidal Takings.

Genocide is committed when a perpetrator, "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such":

- kills members of the group;
- causes them serious bodily injury;
- permanently impairs their mental faculties;
- deliberately subjects them to conditions of life calculated to physically destroy the group;
- imposes members intended to prevent births within the group; or
- forcibly transfers children out of the group to another group.

18 USC § 1091(a).[3] Intent is genocidal if a perpetrator intended to cause a group's material destruc-

[3] The Genocide Convention reflects a similar list. Convention on the Prevention and Punishment of the Crime of Genocide, 28 U.N.T.S. 277 (1951) ("Genocide Convention"),

tion through physical or biological means, targeted the group "as such" rather than targeting individual members, and targeted a part of a group which is substantial either numerically or in the impact its destruction would have on the survival of the group as a whole. *See* Genocide: Legal Precedent Surrounding the Definition of the Crime, Congressional Research Services, September 14, 2004. Courts analyzing genocidal intent have considered whether those carrying out allegedly genocidal acts did so with destructive intent in light of all the available evidence—including "the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy." *Prosecutor v. Tolimir*, Case No. IT-05-88/2, Judgement (Appeal), ¶ 246 (citations omitted); *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Judgement (Trial), September 2, 1998, ¶¶ 523-524. Those factors show these takings were acts of genocide.

Art. 2. The Convention codified "principles which are recognized as binding on states, even without any conventional obligation"—that is, principles where state practice and *opinio juris* are present to demonstrate a rule of customary international law. Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp.15, 28. The Convention is generally recognized today as reflecting customary international law. *E.g.* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. D. 18 USC § 1091 incorporates reservations and understandings attached when the U.S. ratified the Genocide Convention.

1. The Scale of Atrocities Systematically Targeting Hungary's Jews Reflects Genocidal Intent.

When the full force of the Holocaust was brought to bear on Hungary's Jews, they were obliterated with "brutal speed." Justice Ruth Bader Ginsburg, Speech on the National Commemoration of the Days of Remembrance, April 22, 2004, available at *https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-22-04*. One U.S. trial court decision sets out recently-available evidence of the key period of the Holocaust in Hungary particularly clearly:

> Germany occupied Hungary on March 19, 1944. Between May 14, 1944 and July 22, 1944, 137 trains came from Hungary to Auschwitz II-Birkenau, packed with 437,402 Jews. . . Between the people that died on the trains and those selected for forced labor, the German prosecutor estimates that about two-thirds of the arriving people were immediately gassed to death, or about 288,685 people in a two-month time period. . .

In Re Extradition of Breyer, 32 F.Supp.3d 574, 579 (E.D.Pa. 2014) (citations omitted). *See* Joint Appendix, pp.189-196; *A-G Israel v. Eichmann*, 36 I.L.R 5, ¶112 (Dist. Ct. Jerusalem 1961; reported in English 1968). By the end of 1944, "400,000 Jews from Hungary had been murdered at Auschwitz." *Major War Criminals*, p. 466.

Replicating a system which had been tried and tested in other Axis countries, Jews in Hungary were subjected to discriminatory laws "aimed, on the German model, at ousting the Jews from economic life, robbing them of their property, confiscating their homes, limiting their freedom, and rounding them up in readiness for deportation", then "thrown into ghettos" before being shipped to extermination camps. *Eichmann*, ¶¶ 111-112. Many of these Respondents were victimized by Hungarian police and shipped to camps on MAV trains. Complaint, ¶¶ 20, 23, 31, 32, 43-45, 52, 66-68, 74-75, 81, 106.

These crimes followed a period which—by almost any comparison *other* than the brutal denouement in 1944—involved unthinkable horrors. Hungary passed racist laws persecuting Jews within its borders and was an "avid expropriator" of Jewish property. In two particularly egregious examples, Hungary transported 12,000 Jews who were then murdered by German forces and 45 to 50 thousand Jews died during forced labor. *Eichmann*, ¶ 111; Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report, December 2000 (citations omitted).

2. The Systematic Discrimination against Hungary's Jews Denationalized Them and Corroborates Genocidal Intent.

On the basis of similar allegations, the DC District Court held that by 1944, the Government of Hungary "had *de facto* stripped. . . all Hungarian Jews of their citizenship rights." *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 130 (D.D.C. 2011). The court noted that the complaint in that case had pled that Jews over the age of six were required to wear distinctive insignia and that by 1944, Hungarian law precluded Jews from, *inter alia*:

- acquiring Hungarian citizenship by marriage, naturalization, or legalization;
- voting or being elected to public office;
- being employed as civil servants, state employees, or schoolteachers;
- entering into enforceable contracts;
- participating in paramilitary youth training;
- serving in the Hungarian armed forces;
- owning property;
- acquiring title to land or other immovable property; or
- working in a variety of professions or industries.

The court observed that Jews were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary, and ultimately genocide. *Id*. at 129. Respondents allege similar facts here. Complaint, ¶¶ 106-111.

The very first sentence of Hungary's brief ignores this critical historical context and alleges this case is merely about Hungary "taking property from Hungarians in Hungary." *Petitioners' Brief*, p.1.[4] As recognized in *de Csepel*, that is not true: Hungary *de facto* stripped Respondents of their citizenship before these takings and cannot now hide behind it.

3. These Takings Fulfil the Actus Reus of Genocide.

a. Conditions-of-life genocide includes takings calculated to destroy a group.

Among the many genocidal acts targeted at Jews living in Hungary, Respondents—and every other

[4] Petitioner-Defendants go on to argue that "the relevant conduct occurred in Hungary when all Plaintiffs and putative class members were Hungarian nationals", refer to "a foreign sovereign's conduct that harmed its own nationals", "takings by a foreign sovereign of its own nationals' property", "a foreign nation's conduct within its own territory that harmed its own nationals", "historic injustices within [Hungary's] own territory, affecting its own nationals", "wrongs committed against its own nationals on its own territory", "conduct by Hungary affecting Hungarian nationals in Hungary", and "Hungary's conduct within its own territory affecting its own nationals." *Petitioners' Brief*, pp. 2, 3, 9, 16, 18, 24, 35.

Jew in Hungary—were subjected to conditions of life calculated to physically destroy them as a group, as such. Conditions-of-life genocide is directed at a group's physical destruction but does not immediately kill its members. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 505; *Tolimir* AJ, ¶ 228 (citations omitted); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p.3, at ¶ 161 (citations omitted); Genocide Convention, Art. II(c). Raphael Lemkin, the father of the term "genocide", and the framers of the Genocide Convention considered the Nazis' economic persecution to be the type of conduct the Convention defined as conditions-of-life genocide. *See Federal Republic of Germany, et al. v. Philipp, et al.*, Docket No. 19-351, Brief of *Amici Curiae* Holocaust and Nuremberg Historians in Support of Neither Party, Sep. 11, 2020 ("Historians' Philipp Brief"), pp. 26-28 (citations omitted).

International courts have considered property takings in the context of adjudicating conditions-of-life genocide. They have noted several such conditions which tend to include the taking of part of a victim's property or may be facilitated by taking a victim's property—like deprivation of food, shelter, or clothing or expulsion from homes. *E.g. Akayesu*, ¶ 506; *Croatia v. Serbia*, ¶ 161. For instance, the International Court of Justice noted this caselaw then considered whether the looting of property of members of a protected group was done with genocidal intent. While it concluded on the facts before

it (which reflected only a fraction of the other genocidal acts present in this case) that the perpetrators did not act with genocidal intent, it is clear from its consideration of the issue that a taking may fulfill the *actus reus* of genocide. Like any other such act, it must simply be carried out with the requisite destructive intent. *Id.*, ¶¶161, 383-385, 497-498 (citations omitted) (noting that "in order to come within the scope of Article II(c) of the Genocide Convention, [looting of property] must have been such as to have inflicted upon the protected group conditions of life calculated to bring about its physical destruction in whole or in part" which had "not been established" in that particular case). The DC Circuit properly took the same approach. *Simon v. Republic of Hungary*, 812 F.3d 127, 143 (D.C. Cir. 2016) ("*Simon I*").

b. These takings were calculated to destroy Hungary's Jews.

These takings were acts of genocide because they were committed with genocidal intent. The court below made a clear finding (which is not before this Court on appeal) that these takings were "aimed to deprive Hungarian Jews of the resources needed to survive as a people", *Simon I* at 143. *See* Genocide Convention, Art. II(c); *Historians' Philipp Brief* at pp. 25-28. Such a finding might be difficult to make in most expropriation cases but is blindingly obvious in light of the facts here: various Respondents were deprived of property as they boarded trains to Auschwitz, to Nazi-occupied Ukraine for mass exe-

cution, and before being sent to ghettos where they and other Jews were collected before being shipped to extermination camps. Joint Appendix, pp. 127-144.

As the DC Circuit observed, drafters of the Genocide Convention recognized conditions in Jewish ghettos during the Holocaust as an example of the sort of conditions falling within the purview of a draft version of Article II(c). *Simon I* at 143; *see Historians' Philipp Brief*, pp. 26-28. Their ghettoization and the theft of their property were part of the mechanics of execution. The Holocaust "proceeded in a series of steps. . . The Nazis. . . achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies." *Simon I* at 144. *See Eichmann*, ¶193 ("When the order to exterminate the Jews was given, it was evident that this was a most complicated operation. It was not easy to kill millions, dispersed amongst the general population. The victims had to be found and isolated. Not every place is convenient for killing. Not everywhere will the population submit to the killing of their neighbours. Therefore, the victims had to be transferred to suitable places. It was wartime. Labour was needed. Manpower should not be wasted, and, therefore, the working capacity of the victims themselves had to be exploited as long as their muscles could function. It was therefore clear from the outset that a compli-

cated apparatus was required to carry out the task. Everyone who was let into the secret of the extermination, from a certain rank upwards, was aware, too, that such an apparatus existed and that it was functioning, although not every one of them knew how each part of the machine operated, with what means, at what pace, and not even at which place. Hence, the extermination campaign was one single comprehensive act, which cannot be divided into acts or operations carried out by various people at various times and in different places. One team of people accomplished it jointly at all times and in all places.").

Congress has explicitly found Nazi takings of Jewish property were "part of their genocidal campaign." Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524 ("HEAR Act"). Hungary was no exception; appellate courts have noted "the wholesale plunder of Jewish property carried out during the Holocaust" in Hungary, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 594 (D.C. Cir. 2013), *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1097 (D.C. Cir. 2017), and the "integral relationship between expropriation and genocide" alleged in another Hungarian case. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). The JUST Act Report terms the Holocaust "one of the largest organized thefts in human history. . . designed not only to enrich the Nazi regime at the expense of European Jewry but also to permanently eliminate all

aspects of Jewish cultural life." 2020 JUST Act Report, Foreword.

c. Genocide is a narrow category of crime because of high standards of proof which are easily met in this case.

Genocide findings are rare because the destructive intent requirement is so demanding. The ICTY Appeals Chamber observed, 'The demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part, guard against a danger that convictions for this crime will be imposed lightly." *Prosecutor v. Krštić*, Case No. IT-98-33 Judgment, (Appeal), (19 April 2004), ¶37.

International law—which is explicitly incorporated in the expropriation exception—also recognizes that while justice may be most urgent in cases like genocide, the stakes and gravity of the allegation require a high burden of proof before holding a state responsible for such a serious violation. For instance, the ICJ must be "fully convinced" before finding a state responsible for genocide. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 2007, ¶209 ("The Court requires it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The

same standard applies to the proof of attribution for such acts"); *Croatia v. Serbia*, ¶178.

That standard is satisfied here. The U.S. government recognizes the genocidal nature of the Holocaust. HEAR Act. Hungary admits its state responsibility. *See* p. 20-21. Similarly, the European Court of Human Rights deems the Holocaust a "clearly established historical fact." *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX.

Granting justice to the genocide survivors in this case would not open the door to a deluge of lawsuits, either in domestic or foreign courts. Indeed, because these requirements are so demanding, most heinous crimes do not constitute genocide. As a result, the United States has clearly recognized only five post-Cold War genocides: in Bosnia and Herzegovina (1993), Rwanda (1994), Iraq (1995), the Darfur region of Sudan (2004), and recently areas under ISIS control. Holocaust Museum, *By Any Other Name*, p.3. International bodies have concluded that even "massive, large-scale killings" were not genocide because they had not been perpetrated with the requisite intent. *E.g.* S/2000/915, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, ¶13 available at *http://www.rscsl.org/Documents/Establishment/S-2000-915.pdf*.[5]

[5] The massacres in Sierra Leone included other atrocity crimes, war crimes and crimes against humanity. *E.g. Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement (T), 18 May 2012.

d. American courts have granted genocide survivors a forum.

The DC Circuit cautiously held "only that genocide" falls within the expropriation exception—without opining on any other international law violations. *Simon I* at 146. This holding was correct. Federal courts have recognized the unique nature of genocide and our national interest in justice for victims and provided forums for genocide suits.

Circuit courts have held that the "unique" nature of genocide allows for suits under the expropriation exception for genocidal takings while concluding other human rights treaty-based obligations did not give rise to U.S. jurisdiction for domestic takings. *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015). *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). Analyzing a similar cause of action under the Alien Tort Statute, the 9th Circuit allowed causes of action for genocide to proceed but not for crimes against humanity. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013).

4. Hungary is responsible for these genocidal takings.

Aside from the copious evidence of state responsibility in the Complaint, the Hungarian state has admitted its responsibility for the genocide of its Jewish community. *E.g.* Haaretz, Hungary's UN Envoy Makes Country's First-Ever Holocaust Apology, January 25, 2014; International

Holocaust Remembrance Association, Minister Speaks at Holocaust Memorial Day in Budapest, January 27, 2019, available at *https://www.holocaustremembrance.com/ihmd-events/minister-speaks-holocaust-memorial-day-budapest*. As such, this Court can be "fully convinced" of the genocide as international law requires to ascribe state responsibility. *See supra* pp. 18-19.

B. The United States has a specific legal interest in Holocaust restitution.

The U.S.'s national interest in Holocaust restitution begins with its role as one of the two largest recipient states of Holocaust survivor refugees. While the United States did not admit nearly as many Holocaust refugees as wanted to flee here, hundreds of thousands of Jews who had lived in Hitler's Europe came to live in the United States between when the Nazis took power in 1933 and approximately 1952. Holocaust Museum, How Many Refugees Came to the United States from 1933-1945?, available at *https://exhibitions.ushmm.org/americans-and-the-holocaust/how-many-refugees-came-to-the-united-states-from-1933-1945* (last accessed October 25, 2020); Holocaust Museum, United States Immigration and Refugee Law, 1921-1980, available at *https://encyclopedia.ushmm.org/content/en/article/united-states-immigration-and-refugee-law-1921-1980* (last accessed October 25, 2020). They included luminaries from Hannah Arendt to Albert Einstein to Congressman Thomas Lantos. The Conference

on Jewish Material Claims against Germany estimates 85,000 surviving victims of the Nazis still live in the United States today, more than in any country except Israel and almost fifteen times as many as in Hungary. Conference on Jewish Material Claims against Germany, 2018 Claims Conference Worldbook, pp.17 (United States), 70 (Hungary). One third live at or below the poverty line. *E.g.* Adam Reinherz, One-third of Holocaust Survivors Live in Poverty, Pittsburgh Jewish Chronicle, January 23, 2020.

These very practical interests have been reflected in U.S. law and policy for more than 70 years.

1. The parties agree on the importance of Holocaust restitution and signed a treaty guaranteeing it.

At the end of the Holocaust, Hungary made a promise. It signed a treaty with the United States and other Allied powers which provided in relevant part:

> Hungary undertakes that in all cases where the property, legal rights, or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair restoration shall be made therefor.

1947 Treaty, 61 Stat. 2065, 41 U.N.T.S. 135, art. 27, ¶1 ("Paris Peace Treaty"). As a party to the Paris Peace Treaty, the United States has an interest in that promise being kept.

Hungary and the United States have reiterated the importance of this promise. For instance, both signed the non-binding 2009 Terezin Declaration, which notes that "only a part of the confiscated [Jewish] property has been recovered or compensated", affirms the importance of restituting such property, and urges that "every effort be made" to do so. Terezin Declaration on Holocaust Era Assets and Related Issues ("Terezin Declaration"), available at *https://2009-2017.state.gov/p/eur/rls/or/126162.htm* (last accessed October 26, 2020). Hungary also issued a statement as part of the Washington Conference that "The Hungarian Government is fully committed to the restitution or compensation of Holocaust victims concerning cultural assets." Proceedings of the Washington Conference on Holocaust-Related Assets, Delegation Statement of Hungary, December 3, 1998, available at *https://1997-2001.state.gov/regions/eur/holocaust/heac.html* ("Washington Conference Proceedings"), p. 271.

2. Hungary's restitution process has not fulfilled the promise of Paris.

Hungary's expert concedes that for 45 years, it ignored its promise. Joint Appendix at 246 (noting that until the fall of Communism in Hungary, the government "minimized focus on private property

concerns" such as restitution for Holocaust victims). The record in this case reflects Respondents' claims would be time-barred in Hungary; Respondents would not be entitled to discovery; and previous claimants have not received the "full compensation" anticipated by Paris. *Id.*, pp. 264-271.

The State Department recently noted a wide variety of flaws in the post-Communist restitution process, including:

> the problematic claims process for potential claimants of confiscated private property because no restitution of the items taken was possible; the small percentage of a property's market value offered as compensation; citizenship and residence requirements that limited compensation to those who were Hungarian citizens at the time the property was seized or on the date of the law was enacted, or foreign nationals with a primary residence in Hungary in December 1990; the narrow definition of "heirs;" limited archival access and privacy laws that made ownership documents difficult to obtain; limited worldwide notification of the claims process; slow processing of claims; and payment delays.

2020 JUST Act Report, p. 85.

The Court of Appeals properly observed, "Hungary has had over seventy years to vindicate its interests in addressing its role in the Holocaust.

Yet the scheme Hungary currently has in place has not been recognized by the United States government." *Simon v. Republic of Hungary*, 911 F.3d 1172, 1187 (D.C. Cir. 2018) ("*Simon II*"). Indeed, Hungary has not even agreed to negotiate remaining restitution issues with representatives of its Jewish community. 2020 JUST Act Report, p. 85. Similarly, the United States brief in this case reflects it "lacks a working understanding" of Hungary's restitution process and "does not express a view" as to whether US foreign policy interests counsel abstention. *Brief for the United States as Amicus Curiae Supporting Petitioners*, September 11, 2020, p. 26. In the context of the JUST Act's clear criticisms, the United States' reticence to take a position simply reflects the childhood rule: if you don't have anything nice to say, don't say anything at all.

3. The United States has articulated a national interest in Holocaust restitution.

US national interests support the Respondents in this case getting justice. Secretary Pompeo recently declared, in the course of releasing a report on domestic restitution programs in Europe, that work "in this area" is "a priority" for the State Department. Release of the JUST Act Report, Press Statement, Michael R. Pompeo, Secretary of State, July 29, 2020, available at *https://www.state.gov/release-of-the-just-act-report/*. The US has "a longstanding policy interest in ensuring that victims of

Nazi crimes have an opportunity to pursue justice." House Report 114-141, Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, June 8, 2015. "As World War II ended in Europe, the United States led the effort to seek a measure of justice in the form of restitution or compensation for individuals whose assets were stolen during the Holocaust. The effort began while Allied troops were liberating Europe and continues to this day." 2020 JUST Act Report, Foreword.

To pursue that interest, we have passed laws with the purpose "To provide a measure of justice to survivors of the Holocaust all around the world while they are still alive", PL 105-158 Holocaust Victims Redress Act. In the context of art, Congress has extended statutes of limitations for Holocaust victims to bring suit in order, *inter alia*, "to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." HEAR Act, § 3. The current Chairs of the House Foreign Relations and Judiciary Committees (and two former Members of Congress) explained in a recent court filing, "One of the foundations of [U.S. restitution] policy is that claims should be decided on their merits, under an ethical moral policy approach, and with efforts to achieve a 'just and fair' resolution to the claims." *Von Saher v. Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation*, Docket No. 16-56308 (9th

Cir. 2017), Brief of Amicus Curiae Members of Congress E. Engel and J. Nadler and former Members of Congress M. Levine and R. Wexler Supporting Reversal of the Order Granting Summary Judgment, p.13.

4. The United States has demonstrated its interest through leadership on Holocaust restitution.

Beginning shortly after the Holocaust, the United States has implemented its national interest in Holocaust restitution through concrete legal action. The 1947 Military Law sought "to effect to the largest extent possible the speedy restitution of identifiable property. . . to persons who were wrongfully deprived of such property" by Nazi Germany and its allies and vassals. Allied Komandatura Berlin Order, BK/O 49 (26), Art. 2.

The United States redoubled these efforts in the 1990's. The U.S. convened the 1998 Washington Conference on Holocaust-era assets, which resulted in the Washington Principles on Nazi-Confiscated Art. *E.g.* Washington Conference Proceedings. It then established its own commission to determine whether our federal government had possession or control of any assets stolen from Holocaust victims by the Nazi government or its collaborators in other countries. U.S. Holocaust Assets Commission Act, PL 105-186, 22 USC § 1621 note. Subsequently, the United States signed onto the Terezin Declaration and established a special envoy for Holocaust issues.

Just in the past few years, Congress has passed and two presidents have signed into law several pieces of Holocaust legislation:

- the Never Again Education Act, recognizing the scale of the Holocaust and appropriating funds for education about it[6];
- the Justice for Uncompensated Survivors Act, expressing U.S. commitment to restitution for U.S. citizen uncompensated survivors of the Holocaust and requiring the State Department to report on such programs;
- the World War Two Commemoration Act, recognizing *inter alia* the scale of the murderous criminality of the Holocaust;
- the Holocaust Expropriated Art Recovery Act, noting one aspect of Nazi appropriation of Jewish property and recognizing "litigation may be used to recover Nazi-confiscated art"; and
- amended the expropriation exception at issue here to provide that property in the United States for the purpose of an art show would not satisfy the commercial nexus—except for property seized by the Nazis and their collaborators between 1933 and 1945.

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[6] Congress has previously appropriated funds for Holocaust education. *E.g.* PL 101-300 (1999).

Taken together, these laws reflect the longstanding and unequivocal policy of the United States to "relieve American courts from any jurisdictional restraints" in suits seeking to recover property taken in the Holocaust. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d. Cir. 1954), citing Press Release No. 296, April 27, 1949, 'Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers.'

FSIA's legislative history reflects no intention to displace then-existing U.S. policy of providing jurisdiction over restitution claims for Nazi takings. Indeed, Congress recently clarified art taken by Nazi- and Nazi-allied governments during the Holocaust satisfies FSIA's commercial nexus to the United States even if the art was brought here in circumstances where, absent a connection to the Holocaust or the persecution of another "targeted and vulnerable group", it would not satisfy the nexus. 28 USC § 1605 (h)(2).

5. The United States' interest in Holocaust restitution is buttressed by our legal and policy interest in justice for genocide.

Genocide has been termed the "crime of crimes"—both because of its gravity and because it includes other crimes committed with a specific and terrifying intent to extinguish a group of people forever from the rich tapestry of human diver-

sity. Aside from its unique gravity, genocide is special in several relevant ways.

Genocide violates a *jus cogens* norm—as Hungary's expert concedes. Joint Appendix, pp. 230-231. *See Kashef v. BNP Paribas SA*, 925 F.3d 53, 61 (2d Cir. 2019). These norms represent the highest rules of international law, "peremptory norms which permit no derogation." *E.g.* T. Meron, *On a Hierarchy of International Human Rights,* 80 American Journal of International Law 1, 14 (1986). All parties to the Genocide Convention have a legal interest in other parties abiding by it. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on Request for the Indication of Provisional Measures, January 23, 2020, ¶ 41 (noting "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end").[7] *See Case concerning the*

[7] The State Department and U.S. Commission on International Religious Freedom have called for Myanmar/Burma to cooperate with Gambia's genocide case at the ICJ. United States Continues to Call for Justice and Accountability in Burma, August 25, 2020, available at *https://www.state.gov/united-states-continues-to-call-for-justice-and-accountability-in-burma/*; USCIRF Applauds International Court's Ruling on Measures to Protect Rohingya in Burma, January 23, 2020, available at *https://www.uscirf.gov/news-room/press-releases-statements/uscirf-applauds-international-court-s-ruling-measures-protect*.

Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment of 5 February 1970, ICJ Reports (1970), p. 3, at p. 32 (observing in dicta that the Genocide Convention imposes obligations *erga omnes*); *Croatia v. Serbia*, ¶ 87.

Consequently, genocide is one of the few crimes of universal jurisdiction. Restatement (4th) of Foreign Relations Law, § 413; *Sosa v. Alvarez-Machain,* 542 U.S. 692, 762, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (Breyer, J., concurring in part and in the judgment). Similar to the FSIA's commercial nexus, in the criminal-law context Congress has been clear that if an alleged perpetrator of genocide anywhere on earth is present in the United States, they may be prosecuted in American courts. 18 USC § 1091(e)(2)(D). More generally, in a law named after a Holocaust survivor, the United States deemed its national interest to include the prevention of genocide and other atrocity crimes. PL 115-141 Elie Wiesel Genocide and Atrocities Prevention Act of 2018, 22 USC § 2656 note. *See* Presidential Study Directive on Mass Atrocities, August 4, 2011, PSD-10.

C. Comity-based abstention would be inappropriate.

1. Comity interests are captured by FSIA.

Initially, Petitioner-Defendants' request that U.S. courts abstain from deciding this case out of concern for international comity suffers from a sim-

ple failing: it asks this Court to get back into the business of "immunity-by-factor-balancing" that the Court recognized six years ago is no longer a judicial function. *Republic of Argentina v. NML Capital, Ltd.* 573 U.S. 134, 146 (2014).

FSIA's codification of jurisdiction over foreign states was designed to ensure courts would decide jurisdiction in individual cases by interpreting statutes, not relying upon case-by-case executive recommendations. *Republic of Austria v. Altmann*, 541 U.S. 677, 715-17 (2004) (identifying "two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims"); *Republic of Argentina,* 573 U.S. at 140-141.

In doing so, the FSIA comprehensively captured and codified the norms of sovereign-party abstention. The FSIA is based on principles of comity. *Republic of Argentina*, 573 U.S. at 140. Common-law sovereign immunity—which it displaced—was also based on comity. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S 480 (1983)*; see Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). Congress specifically adopted this legislation to remove uncertainty and inconsistency in the disposition of sovereign immunity claims on case-by-case basis, a situation that this Court termed "bedlam". *Republic of Argentina*, 573 U.S. at 141. Congress carefully considered the FSIA over the course of three years. It was drafted by experts in international law to codify clear and uni-

form principles for courts to apply in deciding when comity requires abstention. Permitting "international comity" to provide independent grounds for abstention beyond what is set forth in the statute would undermine Congress's express intent and its carefully considered framework for disposition of these issues. The doctrine of forum non conveniens provides a separate basis for a court to abstain, but the Court of Appeals correctly determined that it does not apply in this case, and that issue is not under review. *Simon II*, 911 F.3d at 1182-1190.

Despite the channeling of sovereign-party comity into legislated rules, Petitioner-Defendants base their call for comity on cases between private parties, mostly brought under the Alien Tort Statute (ATS)—none of which included a State or sovereign defendant. Such cases are not applicable here, where a state defendant is itself responsible for denationalization of and genocide against Respondents. Moreover, those statutes simply give rise to different considerations. Courts must discern ATS causes of action with very limited Congressional guidance. By contrast, the FSIA sets out specific violations as to which foreign sovereigns will be susceptible to suit. Consistent with the additional judicial restraint appropriate where judges must also identify causes of action, courts have generally been more willing to invoke comity in ATS cases than in cases like this one where to invoke comity would mean declining to exercise jurisdiction over a concrete and Congressionally-mandated cause of action. *See Colo. River Water*

Cons. District v. United States, 424 U.S. 800, 817 (1976).

2. Balancing comity factors supports hearing this case in American court.

Should the Court attempt to balance factors, however, the balance tilts in favor of U.S. jurisdiction. Aside from assuming comity continues to apply, Petitioner-Defendants' arguments in support of applying comity in this case are flawed by omissions of relevant facts and inclusion of mistaken assertions, such as:

- the United States does not have a sufficient or significant interest in the resolution of the Respondents' claims;
- the Respondents were fully Hungarian nationals at the time of these genocidal takings; and
- the Hungarian restitution regime provides an adequate alternative forum.

As set forth above, these could not be further from the truth. United States policymaking branches have repeatedly expressed our national interest in Holocaust restitution—as the Court of Appeals noted in rejecting Hungary's similarly reasoned *forum non conveniens* claim. *Simon II*, 911 F.3d at 1188-1189. Hungary had constructively denationalized its Jews before these takings. *See supra* pp. 6-7. And the Hungarian restitution regime is flawed, would not provide "full compensation" as required by the Paris treaty, and would consider

Respondents' claims time-barred. *See supra* pp. 23-24. Respondents' best hope for justice is in American court. It is in our national interest to give them that opportunity.

IV CONCLUSION

The DC Circuit's decision to let Respondents pursue a small measure of justice for the grave crimes against them is consistent with 75 years of US policy, with international law regarding the elements of the crime of genocide, and with the equities in this case. It should be affirmed.

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Respectfully Submitted,

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