No. 19-351

IN THE

Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, *et al.*,

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 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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TABLE OF CONTENTS

		Page
Table of Authorities		v
I.	Statement of Interest	1
II.	Summary of Argument	5
III.	Argument	7
	A. This was a genocidal taking.	7
	1. The unmatched scale of atrocities in the Holocaust reflects the perpetrators' genocidal intent.	9
	2. The Nazi-controlled German state's policy of systematic discrimination against German Jews from 1933 on constructively denationalized them and reflected genocidal intent.	11
	a. By the time of this taking the Nazi government had total power.	12

Page

b. The Nazi-controlled German state's systematically denationalizing German Jews and preventing them from making a living in Germany show genocidal intent. 13

3. This taking fulfills the actus reus of genocide. 17

a. US law recognizes Nazi takings were genocidal. 17

b. International law recognizes Nazi takings were genocidal. 18

c. This taking implemented policies deliberately calculated to destroy Jews. 19

B. The United States has an interest in post-genocide justice. 21

1. The US has articulated a national interest in Holocaust restitution. 21

2. US law and policy demonstrate its interest in Holocaust restitution. 23

Page(s)

3. The US has facilitated Holocaust survivors pursuit of justice in American courts for discriminatory takings against them..... 24

a. The Holocaust Led to the Promulgation of a United States Policy of Jurisdiction Over Claims Related to Nazi Takings..... 25

b. FSIA did not change the policy of jurisdiction over Nazi takings. 27

4. The US has a legal interest in justice for genocide..... 28

C. The Expropriation Exception Clearly Applies to Nazi Takings..... 30

1. The Text of the Expropriation Exception..... 30

2. Jurisdiction is consistent with FSIA's legislative history. 31

3. This Case will Not Open Floodgates of Litigation 32

D. Comity should not undermine the policy imperative of Holocaust restitution. 35

Page(s)

1. Comity interests are captured by FSIA..... 35

2. If the court balances factors, it should let this case go forward. 36

IV. Conclusion 40

TABLE OF AUTHORITIES

Page(s)

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36 I.L.R 5, ¶17-20
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I. Statement of Interest

The American Association of Jewish Lawyers and Jurists ("AAJLJ"), Jerusalem Institute for Justice ("JIJ"), Staten Island Trial Lawyers Association ("SITLA"), Hadassah Women's Zionist Organization of America ("Hadassah"), the Israel Forever Foundation ("IFF"), and Heideman, Nudelman and Kalik P.C. ("HNK") 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 International Association of Jewish Lawyers and Jurists. 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.

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 of Holocaust victims such as Elie Wiesel, Simon Wiesenthal and The Wiesenthal

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[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.

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 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 antisemitism 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 antisemitism. Seeking justice for Holocaust survivors is central to JIJ's work in Israel and around the globe.

The 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, it has provided forums and internship programs with a focus on genocide, specifically the Holocaust. SITLA 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 the 20th 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.

HNK, based in Washington, DC, is a global law firm with affiliates in various parts of the world. HNK was involved in the Holocaust-era assets litigation involving the Swiss National Bank. 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 on behalf of Polish Holocaust survivors in California and organization(s) of the Polish Jewish community. 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. In 2016, Heideman co-chaired with Alan Dershowitz and Irwin Cotler the Nuremberg Symposium at Jagellonian University in Krakow commemorating the Nuremberg Laws and Nuremberg Trials, the content from which was published as a Loyola of Los Angeles International & Comparative Law Review special edition.

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

Justice Robert Jackson described the Holocaust in his opening statement at Nuremberg:

> The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.

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 ("Second Day").

These devastating wrongs began with the calculated destruction of Jews' professional lives, the systematic and forcible taking of their property, and the elimination of their status as German nationals. They culminated in the annihilation of 6,000,000 Jews. *See Brief for Holocaust and Nuremberg Historians as Amici Curiae Supporting Neither Party*, ("Historians' Brief").

The horrors of the Holocaust and the mantra "Never Again" inspired the Genocide Convention and much of contemporary human rights law. Under that law, the only word for these crimes—in their entirety—is genocide. This taking was part of that genocide. It violated international law and falls within FSIA's plain text.

Since Nuremberg, United States law has rightly treated Nazi 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. Petitioner-Defendants' attempts to shift this case's focus to other claims, ignore or minimize Nazi thefts, and hide behind the German nationality the Nazis stripped from Respondents reflects the weakness of their case on *these* facts. This Court should respect the policymaking branches' determination that restitution for Holocaust survivors is in our national interest and not get back into the business of "immunity by factor balancing" just to second-guess that decision.

III. Argument

A. This was a genocidal taking.

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 the group 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).[2] It is the intent to destroy a group that makes any one of these acts genocide—

[2] 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"), Art. 2. The Convention codified "principles which are recognized as binding on states, even without any conventional obligation". Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp.15, 28. The Convention is generally recognized as reflecting customary international law. *E.g.* Restatement (Third) of the Foreign

not particular brutality or any of the other typical aggravating factors.

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-A, Judgement, April 8, 2015, ¶246 (citations omitted); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, September 2, 1998, ¶523-524. *See* Genocide: Legal Precedent Surrounding the Definition of the Crime, Congressional Research Services, September 14, 2004. Those factors show this taking was an act of genocide.[3]

Relations Law of the United States, § 702 cmt. D. Section 1091 reflects U.S. reservations and understandings to the Convention.

[3] As such, the myopic and decontextualized analysis which the Foreign Legal Scholars demand is the precise opposite of what the law requires. *Brief of Amici Curiae Foreign International Scholars and Jurists in Support of Petitioners and Reversal*, pp. 24-25 ("FLS Brief") (criticizing the Circuit Court for "look[ing] at acts that occurred before and after the act in question in determining whether it was one of genocide").

1. The unmatched scale of atrocities in the Holocaust reflects the perpetrators' genocidal intent.

The Holocaust is the most well-documented genocide in human history. US Holocaust Memorial Museum ("USHMM") Holocaust Encyclopedia, *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, available at *https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution (last visited October 25, 2020)*. In convicting those Jackson prosecuted—including perpetrators of this taking—the IMT wrote, "The persecution of the Jews at the hands of the Nazi government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale." International Military Tribunal, Judgment of October 1, 1946, in The Trial of German Major War Criminal*s*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany ("*Major War Criminals*"), p.247.

Congress has repeatedly condemned the Holocaust and acknowledged its gravity and scale. This year, the Never Again Education Act noted: "The term 'the Holocaust' means the systematic, bureaucratic, state-sponsored persecution and murder of 6,000,000 Jews by the Nazi regime and its allies and collaborators." PL 116-141, 36 USC § 2301. These acts do not merely show genocidal intent—they are history's most notorious example of its implementation.

That the Holocaust was genocide is beyond dispute. *E.g.* Written Statement of the Government of the United States of America in *Pleadings, Oral Arguments, Documents: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion of 28th May 1951,* 25; *American Insurance Association v. Garamendi*, 539 U.S. 396, 401 (2003); 36 USC § 2301; HEAR Act; Holocaust Victims' Redress Act, PL 105-158 ("HVRA").[4] Indeed, German law refers to genocide in criminalizing Holocaust denial. German Criminal Code, Art. 130(3).[5] The European Court of Human Rights has affirmed these laws,

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[4] While genocide was not formally charged, both prosecutors and judges at Nuremberg used "genocide" to define the Nazis' crimes. *E.g. United States of America v. Ohlendorf et al.*, MTII, Case 9, Opinion and Judgement of the Tribunal, April 8, 1948.

[5] The Genocide Convention codified pre-existing obligations. Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, pp.15,28; *Prosecutor v. Krštić*, Case No. IT-98-33, Judgement (Trial), August 2, 2001, ¶541. *See A-G Israel v. Eichmann*, 36 I.L.R 5, ¶17-20 (Dist. Ct. Jerusalem 1961; reported in English 1968); Genocide Convention, preamble (noting "genocide has inflicted great losses on humanity", in the past tense). *E.g.* Kate Brady, "Germany officially refers to Herero massacre as genocide", Deutsche Welle, July 13, 2016, available at *http://www.dw.com/en/germany-officially-refers-to-herero-massacre-as-genocide/a-19396892*. *Contra* FLS Brief, p.23. As Churchill put it, Nazi mass executions were "a crime without a name"—but still a crime. Winston Churchill: Broadcast Regarding his Meeting with Roosevelt (August 24, 1941), available at *https://www.jewishvirtuallibrary.org/churchill-broadcast-regarding-his-meeting-with-roosevelt-august-1941*.

reasoning Nazi crimes are so grave and so firmly established that only bigotry can explain their denial. *E.g. Witzsch v. Germany*, 7485/03, Decision, 13 December 2005, pp.7-8 (citations omitted).

2. The Nazi-controlled German state's policy of systematic discrimination against German Jews from 1933 on constructively denationalized them and reflected genocidal intent.

In February 1920, Adolph Hitler and the Nazi party released a 25-point platform. From that point, denationalization of German Jews was Nazi policy:

> Only a national comrade can be a citizen. Only those who have German blood, regardless of faith, can be a citizen. Hence no Jew can be a citizen.

USHMM. (n.d.). *Nazi Party Platform*, available at *https://www.ushmm.org/learn/timeline-of-events/before-1933/nazi-party-platform (last visited October 25, 2020).*

Once Hitler became Chancellor of Germany in January 1933, the Nazis began a 'destruction process' with four integral components—definition, expropriation, concentration, and ultimately annihilation. Raul Hilberg, *The Destruction of the European Jews*, revised edition, 3 vols (New York: Holmes & Meier, 1985), pp. 53ff.

The court below rightly found the Holocaust began in 1933. *Philipp v. Federal Republic of Germany,*

894 F.3d 406, 413 (D.C. Cir. 2018). In acknowledging the Holocaust and crafting remedial measures, our policymaking branches have consistently set its commencement in 1933—when the party which had declared "No Jew can be a citizen" took power in Germany. This recognition is even included in the expropriation exception itself. 28 USC § 1605(h)(3)(C). *See* Control Council Law No. 10, Art. 2(5); Allied Komandatura Berlin Order, BK/O 49 (26), Art.2,4; Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 22 USC § 1621 ("HEAR Act"); US Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 22 USC §1621; *Respondents' Brief*, p.34 (quoting a letter from various Members of Congress which observes the Holocaust's timing is "settled and sacred").

a. By the time of this taking the Nazi government had total power.

Beginning in January 1933, the Nazis quickly centralized and consolidated power. By July 1933, the Nazi government had banned all other political parties; assigned all legislative power to Hitler and his ministers; abolished freedom of speech, assembly, privacy and the press; legalized phone tapping and interception of correspondence; suspended the autonomy of federated states; and enrolled 50,000 SA men as auxiliary police. *See* Smithsonian Magazine, February 21, 2017, *The True Story of the Reichstag Fire and the Nazi Rise to Power*, available at *https://www.smithsonianmag.com/history/true-story-reichstag-fire-and-nazis-rise-power-180962240/*.

On December 1, 1933, the Reichstag declared the Nazi party "inseparable from the state." On August 2, 1934, President Hindenburg died. Hitler combined the offices of Chancellor and President, declaring himself *Führer*. The transition from democratic republic to Nazi dictatorship was complete. *Major War Criminals*, pp.176-182; USHMM, *Death of German President von Hindenburg https://www.ushmm.org/learn/timeline-of-events/1933-1938/death-of-german-president-von-hindenburg (last visited October 25, 2020).*

b. The Nazi-controlled German state's systematically denationalizing German Jews and preventing them from making a living in Germany show genocidal intent.

"With the coming of the Nazis into power in 1933, persecution of the Jews became official state policy." *Major War Criminals*, p.180. Jewish property was part of the target: Hermann Göring, one of the perpetrators of this taking, declared "I intend to plunder and do it thoroughly." William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 942 (Simon & Schuster 1960). *See* Complaint, ¶73-75.

The Nazi government weaponized the law to remove Jews from Germany's economic and political life. *Major War Criminals*, p.248; USHMM, *Anti-Jewish Legislation in Prewar Germany*, available at *https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany*

(last visited October 25, 2020). The government commenced a progressively violent campaign terrorizing German Jews. *See Historians' Brief* at 10. The SA targeted Jewish businesses for boycott and picketing campaigns. *Id*.; *see* Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report, December 2000 ("Advisory Commission Report") (citations omitted).

As a result, even before this taking, roughly 83,000 German Jews had fled the country—including Consortium members. *Historians' Brief*, pp. 12-13; *see* Debórah Dwork & Robert Jan van Pelt, *Flight from the Reich: Refugee Jews, 1933-1946*, pp. 17-18, 92 (W.W. Norton & Company 2012). Those who remained were stripped of their rights, barred from their professions, and at constant risk of being physically attacked or killed. By 1935 the Nazi government:

- Excluded Jewish and "politically unreliable" people from the civil service;
- Revoked the citizenship of naturalized Jews and "undesirables";
- Imposed a 1.5% quota on the admission of "non-Aryans" to public schools and universities;
- Fired Jewish civilian workers from the army;

- Revoked the licenses of Jewish tax consultants;
- Implemented a policy of "Aryanization" of businesses;
- Forbade Jewish actors from performing on stage or screen;
- Forbade Jews from working in radio or theatre, or selling paintings or sculptures; and
- Took more than 100 Jews from Frankfurt, where two of the three Welfenschatz owners lived, to the Osthofen camp where they were murdered.

Historians' Brief, pp.10-19; USHMM, *Antisemitic Legislation 1933-1939*, *https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939 (last visited October 25, 2020)*; ADL, *Nazi Germany and Anti-Jewish Policy*, *https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/nazi-germany-and-anti-jewish-policy.pdf (last visited October 25, 2020)*; Simone Ladwig-Winters, *Lawyers Without Rights: the Fate of Jewish Lawyers in Berlin after 1933* (American Bar Association 2018); USHMM, *Aryanization*, *https://encyclopedia.ushmm.org/content/en/article/aryanization (last visited October 25, 2020)*. Similar Holocaust measures have been found to constructively denationalize their victims. *See De Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 129-130 (D.D.C. 2011).

Jews in the arts were systematically targeted. The Nazis established the Reich Chamber of Culture to supervise and regulate German culture and ensure the arts were brought in line with Nazi goals. Propaganda Minister Goebbels declared Jews unfit to administer German cultural property. USHMM, *Culture in the Third Reich*, *https://encyclopedia.ushmm.org/content/en/article/aryanization (last visited October 25, 2020)*; *Historians' Brief*, p.22; Steinweis, A. E., *Art, Ideology & Economics in Nazi Germany* (1996: University of North Carolina Press), p. 108. On October 16, 1934 the Reichstag restricted the art trade to members of the Reich Chamber of Culture—as Jews and other non-Aryans were being purged from that body. *Historians' Brief*, pp. 12, 22-23. This "effectively ended" most Jewish art dealers' ability to earn a living. Targeted for legal and physical persecution, the Consortium members had no choice but to sell the Welfenschatz at a substantial loss. *E.g.* Complaint, ¶120, 124, 138-139, 145.

The State Department explained the goal of these policies: "The Nazi regime's confiscation, seizure, and wrongful transfer of the Jewish people's property were 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." 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"), Foreword. *See* Avraham Barkai, *From*

Boycott to Annihilation: The Economic Struggle of German Jews, 1933-1943, trans. William Templer (Univ. Press of New England, 1989), pp. 56-57; Richard Breitman, *Official Secrets: What the Nazis Planned, What the British and Americans Knew* (Hill & Wang, 1998), pp. 20-21; Advisory Commission Report.

3. This taking fulfills the actus reus of genocide.

As the DC Circuit held, the taking in this case was an act of genocide—calculated to create conditions of life which would destroy the Jewish people in whole or substantial part. *Philipp,* 894 F.3d at 411-413. That conclusion is not on appeal and is, in any event, the only reasonable one.

a. US law recognizes Nazi takings were genocidal.

Nazi takings of Jewish property were "part of their genocidal campaign," HEAR Act, § 2, and "a critical element and incentive in their campaign of genocide against individuals of Jewish heritage", HVRA, § 201(4). The Seventh Circuit noted in the context of a similar suit the "integral relationship between expropriation and genocide" alleged. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). As one court explained, "the Nazi party took art from Jewish citizens as part of a systematic plan to rob them of their property, their identity, and ultimately their lives." *Vineberg v. Bissonnette*, 529 F.Supp. 2d 300, 305 (D.R.I. 2007) (citation omitted).

All told, the Holocaust included "one of the largest organized thefts in human history." JUST Act Report, Foreword. The Nazis "engaged in a premeditated, mass theft of art. . . confiscated or otherwise misappropriated hundreds of thousands of works of art and other property" in what "has been described as the 'greatest displacement of art in human history.'" Monuments Men Recognition Act, 31 USC § 5111 ("MMRA").

b. International law recognizes Nazi takings were genocidal.

Raphael Lemkin and the framers of the Genocide Convention considered the Nazis' economic persecution to be the type of conduct the Convention would define as conditions-of-life genocide. *See Historians' Brief*, pp.26-28 (citations omitted).[6] International law continues to recognize property takings, when committed with the requisite intent, may constitute genocide. *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, 383-385, 497-498 (citations omitted) ("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

[6] The stages preceding the Final Solution laid the groundwork for denationalization, dehumanization, and destruction. *See Major War Criminals* (noting years of increasing persecution before the decision on the final solution in 1941 and its subsequent implementation).

of life calculated to bring about its physical destruction in whole or in part," though such intent had "not been established" in that specific case).

c. This taking implemented policies deliberately calculated to destroy Jews.

This taking was part of the Nazis' campaign to "permanently eliminate all aspects of Jewish cultural life." Perpetrators included high-ranking Nazi government officials like Göring and Rosenberg—both later convicted, and sentenced to death, for atrocity crimes against the Jews of Europe. *Major War Criminals*, pp.487,496.[7] Their intent to destroy European Jewry is obvious from:

- Their imposition of discriminatory measures even before the taking which deprived Jews of their livelihoods in fields including art and effectively stripped them of their citizenship;

[7] There were economic aspects to both Göring and Rosenberg's convictions. *Major War Criminals*, pp.487,496. Aside from his economic crimes, the IMT found Göring was "the leading war aggressor, both as political and as military leader; he was the director of the slave labour programme and the creator of the oppressive programme against the Jews and other races, at home and abroad. All of these crimes he has frankly admitted. On some specific cases there may be conflict of testimony, but in terms of the broad outline his own admissions are more than sufficiently wide to be conclusive of his guilt. His guilt is unique in its enormity. The record discloses no excuses for this man." *Id.*, p.487.

- the beginning of murders of Jews, also before the taking;
- their formal denationalization of German Jews through the notorious Nuremberg race laws, just after the taking[8]; and
- their subsequent attempt to murder the entire European Jewish population—which was very nearly successful and included millions of homicides.

By the time of the taking, Consortium members were branded enemies of the state and targeted for *de jure* discrimination in their professions solely because they were Jewish. During the "negotiations", one stayed in a hotel from which he could see Hitler Youth rallies and hear people chant, "do not buy from Jews." *E.g.* Casey Ross, *Gift to Hitler Spurs a Claim for Justice*, Boston Globe, July 14, 2015. In November 1935, Göring presented the collection—freed from its taint of Jewish ownership—to Hitler at a public ceremony with great fanfare. Complaint, ¶13, 179. *Contra Petitioners' Brief*, pp.11-12; *FLS Brief*, pp.23-33. International tribunals have relied on similar contextual evidence to find genocidal intent. *E.g. Krštić*, ¶596.[9]

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[8] Another perpetrator of this taking, Wilhelm Stuckart, was instrumental in drafting those laws. Complaint, ¶100, 109.

[9] Petitioners and the scholars erroneously conflate motive and intent in emphasizing the perpetrators had other reasons for taking the Welfenschatz. *Petitioners' Brief* at 36; *FLS brief* at 30. *See Prosecutor v. Karemera et al.*, Judgement (T), February 2, 2012, ¶1579 (citations omitted) ("A perpetra-

B. The United States has an interest in post-genocide justice.

1. The US has articulated a national interest in Holocaust restitution.

Secretary Pompeo recently declared work on Holocaust restitution 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 long-standing 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, and has passed laws in order to "provide a measure of justice to survivors of the Holocaust all around the world while they are still alive", HVRA. The current Chairs of the House Foreign Relations and Judiciary Committees explained, "One of the foundations of [US Holocaust 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*

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tor does not have to be solely motivated by a criminal intent to commit genocide, nor does the existence of personal motive prevent him from having the specific intent to commit genocide").

J. Nadler and former Members of Congress M. Levine and R. Wexler Supporting Reversal of the Order Granting Summary Judgment, p.13. The HEAR Act's committee report cites the "clear policy of the United States" that items of religious and cultural significance taken in violation of international law should be returned to their rightful owners. Senate Report 114-394, Holocaust Expropriated Art Recovery Act of 2016, December 6, 2016, fn.3.

United States interest in Holocaust restitution begins with its role as the state receiving the second-largest number of Holocaust refugees. While the US 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. USHMM, 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 visited October 25, 2020)*; 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 visited October 25, 2020)*. They included luminaries from Hannah Arendt to Albert Einstein to Congressman Thomas Lantos. An estimated 85,000 survivors of Nazi crimes still live in the United States today, more than any country except Israel. Conference on Jewish Material Claims against Germany, 2018

Claims Conference Worldbook, p.17. 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.

2. US law and policy demonstrate its interest in Holocaust restitution.

Beginning during the Holocaust, the United States made "unprecedented" efforts to catalogue, preserve and repatriate cultural property. MMRA. The Allied Powers reserved the right to invalidate Nazi transfers, even those which "purport to be voluntarily effected"—like this one. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, Jan. 5, 1943, in 1 *Foreign Relations* 444 (1943). The post-war legal regime presumed Jews who sold property before fleeing Nazi Germany did not do so voluntarily. *See Respondents' Brief* at 20.

More recently, Congress passed and two Presidents signed into law three key pieces of Holocaust legislation facilitating restitution for survivors:

- the Justice for Uncompensated Survivors Act, expressing US commitment to restitution for US citizen uncompensated survivors of the Holocaust and requiring the State Department to report on such programs;
- the Holocaust Expropriated Art Recovery Act, broadening access to our courts for

survivors who were subjected to Holocaust-related art takings like this one; and

- an amendment to the expropriation exception providing 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.

3. The US has facilitated Holocaust survivors pursuit of justice in American courts for discriminatory takings against them.

This body of law reflects 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. Respondents' suit alleges property taken in violation of international law by the Nazis and fits squarely within the FSIA's expropriation exception and these decades of consistent practice. Indeed, American support for Holocaust restitution helped shape our understanding of sovereign immunity and its limitations for decades, beginning even before FSIA codified that understanding and vested responsibility for its implementation in the judiciary.

a. The Holocaust Led to the Promulgation of a United States Policy of Jurisdiction Over Claims Related to Nazi Takings.

Before the Holocaust, the United States extended virtually absolute immunity to foreign sovereigns. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-87, 103 S. Ct. 1962, 1968, 76 L. Ed. 2d 81 (1983). U.S. courts also declined to pass judgment on the validity of acts of foreign sovereigns in actions where the sovereign was not a party. *See Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij* 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). Federal policy to support Holocaust restitution claims led to those doctrines being revised.

In 1949, the Second Circuit affirmed the dismissal of a Jewish plaintiff's claim that a private party converted his assets with the aid of Nazi officials through a forced sale. *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 76 (2d Cir. 1949) ("*Bernstein I*"). It held that under existing precedent, the trial court could not pass judgment on the acts of Germany. *Id.* at 73.

The State Department immediately and forcefully opposed the decision. Through Acting Legal Adviser Jack B. Tate, the State Department issued a letter characterizing Nazi takings as "forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls." *Id.* To address

these "forcible" and "discriminatory" takings, the State Department declared the unequivocal policy of the United States: to "undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property. . ." Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Attorneys for plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York (Apr. 13, 1949), quoted in *Bernstein II*, 210 F.2d at 376. As such, "[t]he 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." *Id.* (Emphasis added.)

Applying this policy, the Second Circuit permitted the plaintiff's claims to proceed, "striking out all restraints based on inability of court to pass on acts of officials in Germany during period in question." *Id.* at 376. This declaration of U.S. policy endorsing jurisdiction in cases involving Nazi takings was followed in 1952 by another letter by Acting Legal Adviser Tate, commonly known as the "Tate Letter." Under the Tate Letter, the United States adopted the restrictive theory of immunity, removing sovereign immunity for commercial acts in accord with developing international practice. *See Verlinden B.V.*, 461 U.S. at 486-87.

Over the following decades, the State Department determined on a case-by-case basis whether to

make "suggestions" of immunity to courts, and sovereign immunity remained a question of comity and Executive policy. In 1976, the FSIA codified the restrictive theory of immunity and vested immunity determinations in the courts. *Id*. The underlying policies concerning U.S. jurisdiction and sovereignty remained consistent.

b. FSIA did not change the policy of jurisdiction over Nazi takings.

The codification of jurisdiction over foreign states was designed to ensure courts would decide jurisdiction 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").

Support for survivors' access to US courts has continued under FSIA. The HEAR Act acknowledges "litigation may be used to resolve claims to recover Nazi-confiscated art," § 2(8). Its purposes include to "open courts to claimants to bring covered claims [for Nazi-era takings of art] and have them resolved on the merits, consistent with the Terezin Declaration." HEAR Act Senate Report. And Congress clarified Holocaust-expropriated art 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).

4. The US has a legal interest in justice for genocide.

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, 23 January 2020, ¶ 41.[10] *See Case concerning the 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[11]

[10] The State Department and 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.*

[11] Germany itself has applied its criminal law extraterritorially for very serious crimes. *E.g.* Petra Wischgoll, German court opens first Syria torture trial, Reuters, April 23, 2020, available at *https://www.reuters.com/article/us-syria-security-*

jurisdiction and not committing it one of international law's few *jus cogens* norms. Restatement (4th) of Foreign Relations Law, § 413; *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019); *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). Congress has deemed our national interest to include the prevention of genocide and other atrocity crimes. Elie Wiesel Genocide and Atrocities Prevention Act of 2018, 22 USC § 2656 note.

Petitioner-Defendants mistakenly suggest that regardless of international law's condemnation of genocide, it precludes the exercise of US jurisdiction. *Petitioners' Brief*, pp.32-33. First, the *Charming Betsy* canon applies only when American law is ambiguous. *Murray v. the Charming Betsy*, 6 US (2 Cranch) 64 (1804). *See The Paquete Habana*, 175 US 677 (1900) (customary international law applies "where there is no treaty and no controlling legislative act or judicial decision"). The expropriation exception is clear. Second, the ICJ decision upon which Petitioners rely was grounded on state immunity for acts by military forces. *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening*); Judgment, ICJ Reports 2012, p.99. That issue is not presented here. Third, while the ICJ considered other atrocity crimes and *jus cogens* violations, the decision did not address a

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germany/german-court-opens-first-syria-torture-trial-id USKCN22525P.

genocide case—the word "genocide" does not even appear in the judgment.

C. The Expropriation Exception Clearly Applies to Nazi Takings

1. The Text of the Expropriation Exception

The expropriation exception grants jurisdiction over claims for "property taken in violation of international law" (where the provision's other jurisdictional requirements are satisfied). 28 USC § 1605(a)(3). Genocide falls well within its plain meaning.

Petitioner-Defendants claim the exception is limited to a "term of art" understanding of takings which excludes "domestic takings". *Petitioners' Brief* at 22-24. They fail entirely, however, to establish the extraordinary, unstated assumption that Congress would have considered Jews living in Nazi Germany to be "German nationals"—a title for which the Nazi government considered them congenitally ineligible. *See supra* p. 11.

In any event, the FSIA's text is plain. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1749, 207 L. Ed. 2d 218 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); *Bates v. United States*, 522 U.S. 23, 29 (1997).

2. Jurisdiction is consistent with FSIA's legislative history.

FSIA's legislative history reflects no intention to displace then-existing US policy of providing jurisdiction over restitution claims for Nazi takings. *See supra* pp. 25-26. A single short passage explains the phrase "taken in violation of international law":

> The term 'taken in violation of international law' 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.* Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable. *See* 22 U.S.C. 2370(e)(2).

H.R. REP. 94-1487, 1976 U.S.C.C.A.N. 6604, 6618 (emphasis added). Congress could have imposed additional restrictions had it wished to limit the expropriation exception. It chose not to.[12]

Instead, Congress recently preserved U.S. jurisdiction over art displayed at art shows in the U.S.

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[12] Petitioners claim withdrawing immunity for conditions-of-life genocide in the form of property takings, but not for genocidal murders, is illogical. *Petitioners' Brief* at 30. But this outcome is fully consistent with withdrawing immunity from suit for any form of takings without withdrawing immunity from suits alleging similar homicides—which the plain language of FSIA clearly does.

which had been taken by the Nazis beginning in 1933—when the Nazi government only had authority over German Jews. To bar Respondents' claims as "domestic takings", aside from its historical absurdity, would violate the canons of construction by rendering Congress's inclusion of art taken from 1933 to 1938 meaningless. 28 USC § 1603(h); *Respondents' Brief* at 14-15.

3. This Case will Not Open Floodgates of Litigation

Against the backdrop of crimes so horrifying our language needed a new word to condemn them, Petitioner-Defendants suggest this Court is incapable of permitting this small measure of justice without opening US courts to every alleged infraction in world history. *Petitioners' Brief,* pp.37-38. Justice Jackson anticipated such inapt comparisons:

> Let there be no misunderstanding about the charge of persecuting Jews. What we charge against these defendants is not those arrogances and pretensions which frequently accompany the intermingling of different peoples and which are likely, despite the honest efforts of government, to produce regrettable crimes and convulsions. . .
>
> The conspiracy or common plan to exterminate the Jew was so methodically and thoroughly pursued, that despite the German defeat and Nazi prostration this Nazi aim largely has succeeded. Only remnants of the

> European Jewish population remain in Germany, in the countries which Germany occupied, and in those which were her satellites or collaborators. Of the 9,600,000 Jews who lived in Nazi-dominated Europe, 60 percent are authoritatively estimated to have perished. Five million seven hundred thousand Jews are missing from the countries in which they formerly lived, and over 4,500,000 cannot be accounted for by the normal death rate nor by immigration; nor are they included among displaced persons. History does not record a crime ever perpetrated against so many victims or one ever carried out with such calculated cruelty.

Second Day, supra. This case cannot be generalized to every alleged violation.

First, genocide is a unique violation of international law. Circuit courts have found the "unique" nature of genocide permits suits like this for genocidal takings while concluding other human rights treaty-based obligations did not give rise to US jurisdiction for domestic takings, *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015), *Abelesz*, 692 F.3d 661, and declined to apply the act of state doctrine to genocide allegations. *Kashef*, 925 F.3d at 61-62. Analyzing an Alien Tort Statute suit, the Ninth Circuit allowed causes of action for genocide—but not crimes against humanity—to proceed. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), vacated on other grounds, 133 S. Ct. 1995 (2013).

Second, genocide is very rare. The United States has clearly recognized only five post-Cold War genocides. USHMM, *By Any Other Name*, p.3. The Holocaust was an even rarer crime where the taking of property satisfied the *actus reus* of genocide. *See supra* at pp. 17-20. Petitioners' suggestion that "any member of a group that his historically faced persecution or discrimination abroad" could allege a taking from them was genocidal is incorrect. *Petitioners' Brief*, p.37.

Third, to hold a state responsible for an internationally wrongful act of the magnitude of genocide, a court must be "fully convinced," an exacting standard which is satisfied here but would not be satisfied in the "fraught" situations to which Germany analogizes this case. *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; *Croatia v. Serbia*, ¶178. *See Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (Holocaust a "clearly established historical fact").

Finally, the exception's application is limited by the required commercial nexus with the United States. *See* 28 U.S.C. §1605(a)(3). Where this nexus is absent, a state is immune. Here, Respondents pled the nexus in their Amended Complaint, including that Petitioner-Defendant SPK engages in business in the United States and prominently features the Welfenschatz in books that it sells in the United States. *See* Joint

Appendix at 53-57. Petitioner-Defendants have not placed the nexus at issue in this appeal.

D. Comity should not undermine the policy imperative of Holocaust restitution.

1. Comity interests are captured by FSIA.

Petitioner-Defendants' request that US courts defer out of comity to German adjudicative processes asks this Court to get back into the business of "immunity-by-factor-balancing" that the Court recognized six years ago was no longer a judicial function. *Republic of Argentina v. NML Capital,* 134 S.Ct. 2250, 2258 (2014). To do so would undermine the logic of FSIA.

The FSIA comprehensively captured and codified the norms of sovereign-party abstention. It is based on comity principles. *Id*. Common-law sovereign immunity—which it displaced—was also based on comity. *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812). Congress adopted FSIA in order to end the inconsistent, uncertain case-by-case disposition of sovereign immunity claims, a situation this Court termed "bedlam". *Republic of Argentina* at 141. Before adopting FSIA, Congress carefully considered the statute for three years. It was drafted by experts in international law to provide clear and uniform principles for courts to apply in deciding when the US should refrain from exercising jurisdiction over foreign sovereigns.

Permitting "international comity" to provide independent grounds for abstention beyond FSIA's would undermine Congress's express intent and its carefully considered framework for disposition of these issues.

Revealingly, Petitioner-Defendants rely exclusively upon cases between private parties, not against a State, several of which were brought under the ATS, not FSIA. For instance, Petitioner-Defendants cite *Kiobel*, 569 U.S. 108 (2013)—an ATS case against a corporate defendant—as "perhaps the best example" for invoking comity. *Petitioners' Brief*, p.44. Such cases are not applicable here, where a state is itself responsible for denationalization of and genocide against Respondents. Moreover, courts have generally been more willing to invoke comity in ATS cases—where courts must identify causes of action—than in cases like this 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. If the court balances factors, it should let this case go forward.

Applying the pre-FSIA comity framework to this case supports U.S. jurisdiction. The United States has significant policy interests in fair restitution of Holocaust claims—interests that have limited the scope of sovereign immunity for decades. *See supra* pp. 24-27. Petitioner-Defendants' assertion that the

subject matter of this case has "little connection" to the United States is patently incorrect. Petitioners' Brief, pp. 11, 13, 41.

Moreover, Respondents did first seek fair restitution in Germany. Their claims were denied in a process which has raised serious concerns. They should not be required to give Petitioner-Defendants a second chance to do the right thing.

The Nazis looted more than 600,000 pieces of art in the Holocaust. More than 100,000 remain missing. 2020 JUST Act Report at 74. Yet the Limbach Commission provided just sixteen recommendations over more than a decade of existence. Where it made recommendations, the Commission was criticized for favoring the cultural institutions that held the art.

In the wake of the Commission's Welfenschatz decision, Petitioner-Defendant SPK's own President gave a public speech calling for major reforms to the Commission. He noted the Commission's:

- failure to recognize Nazi persecution of Jews began in 1933, before the sale of the Welfenschatz;
- lack of transparency;
- failure to adopt published procedures;
- administration by a non-neutral body that advised the museums that were parties to the disputes before it; and

- lack of any representative of a Jewish organization.

See German Advisory Commission—Changes proposed by Hermann Parzinger, President of the SPK on 28 November 2015, *available at https://www.lootedart.com/RQB1SB423561*. Significant reforms were implemented in 2016, including the first adoption of published procedures, but they were too late for the Welfenschatz case. *E.g.* Danny Lewis, *Germany Is Reworking the Commission That Handles Restitution for Nazi-Looted Art*, Smithsonian Magazine, August 10, 2016, available at *https://www.smithsonianmag.com/smart-news/germany-reworking-commission-handles-restitution-nazi-looted-art-180960087/*.

Shortly after the deficient Commission process in this case, Germany designated the Welfenschatz "cultural property of national significance." *See* Database of Protected Cultural Property, available in German at *http://www.kulturgutschutz-deutschland.de/DE/3_Datenbank/Kulturgut/Berlin/03803.html*. This designation prohibited removing the Welfenschatz from Germany. It raises significant concerns that Germany's opaque and nonbinding Commission process was used to preserve Petitioners' control of the Welfenschatz.

Although the 2020 JUST Act Report commends Germany on the seriousness and effectiveness of its restitution programs in many areas, it notes "[i]n the realm of movable property, there is much left to do to identify looted art and facilitate a fair solu-

tion for its return to rightful owners or their heirs. . . [c]ompensation for and restitution of looted art remains a work in progress." 2020 JUST Act Report, Foreword, p. 74. The JUST Act Report also notes that the Commission made reforms that benefited claimants as "part of the November 2018 joint U.S.-German declaration." *Id*. In other words, the United States led on restitution by helping ensure the Commission's process was improved years after the Commission dismissed Respondents' claim. It should maintain its historic role and commitment to Holocaust victims and their heirs and allow this case to proceed.

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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